Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,

Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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251 pp.

QUESTIONS PRESENTED

I

Does it violate the Fifth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution for the state to fix a rate for utility service that is insufficient for the utility to meet even its approved operating expenses, thereby leaving the utility in an operational deficit?

II

Does it violate the Fifth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution for the state, in the name of an asserted public policy, to sever a material pricing term in a utility contract, after the utility's performance and without providing any compensation for this taking?

III

Does it violate the Fifth Amendment and Section 1 of the Fourteenth Amendment to the United States Constitution for the state selectively to deny a utility the right to enforce a contractual term when similarly situated utilities have been allowed to enforce similar terms, and when no basis is articulated for the difference in treatment?

LIST OF PARTIES

The petitioner below in the New Jersey Supreme Court, and appellant before the Superior Court of New Jersey, Appellate Division was Solid Waste Transfer & Recycling, Inc. ("SWTR"). SWTR is the petitioner before this Court. SWTR has no parent or subsidiary affiliations.

The respondents below were the State of New Jersey, Department of Environmental Protection ("DEP"), the successor in this matter to the State of New Jersey Board of Public Utilities ("BPU"), the County of Essex, New Jersey ("Essex" or the "County"), the City of Newark, New Jersey ("Newark"), the New Jersey Department of the Public Advocate, Division of Rate Counsel, now known as the Division of the Ratepayer Advocate ("Rate Counsel"), and Waste Management of New Jersey ("Waste Management"). Waste Management was also a petitioner to the Supreme Court of New Jersey and an appellant in a consolidated appeal before the Appellate Division.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

Petitioner Solid Waste Transfer & Recycling, Inc. ("SWTR" or the "Petitioners") respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division ("Appellate Division"), which affirmed orders of the State of New Jersey, Department of Environmental Protection ("DEP") and Board of Public Utilities ("BPU"), the DEP's regulatory predecessor in this matter. The DEP and BPU orders denied SWTR, a solid waste transfer station deemed to be a public utility subject to the rate-making authority of the DEP, a rate sufficient for

SWTR to meet its approved operating expenses. The state thereby set a rate confiscatory of SWTR's property rights protected by the United States Constitution. Petitioner filed a timely petition for certification with the New Jersey Supreme Court seeking review of the Appellate Division's decision. The New Jersey Supreme Court denied certification in an order issued on September 4, 1997 and entered on September 8, 1997.

OPINIONS BELOW

The September 8, 1997 order of the New Jersey Supreme Court denying SWTR's petition for certification is unreported and is reproduced herein as Appendix "A." The April 10, 1997 decision and judgment of the Appellate Division is reported at 299 N.J.Super. 577, 691 A.2d 846 (1997) and is reproduced herein as Appendix "B." The August 19, 1994 order of the DEP, on motion for reconsideration from the August 8, 1991 order of the BPU, is unreported and is reproduced herein as Appendix "C." The August 8, 1991 order of the BPU, the DEP's predecessor in this matter, modifying the initial decision of the State of New Jersey Office of Administrative Law ("OAL"), is unreported and is annexed hereto as Appendix "D." The December 31, 1990 initial decision of the OAL is unreported and is annexed hereto as Appendix "E."

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the April 10, 1997 judgment of the Appellate Division is invoked under Title 28 of the United States Code, Section 1257(a). This Petition for Certiorari is timely filed as it is filed on Monday, December 8, 1997, the first business day after Sunday, December 7, 1997, which was the ninetieth day after September 8, 1997. On September 8, 1997, the New Jersey Supreme Court entered its order denying SWTR's petition for certification from the decision of the Appellate Division. *See* Rules of the Supreme Court of the United States, Rules 13.1 and 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital crime, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

In 1986, a small group of investors formed SWTR and committed significant amounts of personal funds to its operation. This case is about how the State of New Jersey, through an unconstitutional exercise of its regulatory rate-making authority, confiscated their monies.

SWTR is a solid waste transfer station located in Newark, New Jersey. (60a). A transfer station is a local solid waste collection facility to which municipal haulers bring waste, which is then separated by the transfer station into various waste categories and prepared for long-haul shipping to an out-of-state landfill. (74a). Four individuals, Mark Mauriello, Dr. Joseph Mauriello, Harold Martin, and Patrick Giordano, formed SWTR throughout late 1986 and early 1987 in response to a solid waste crisis faced by Essex County. (207a). A state court had ordered that Essex cease using the Hackensack Meadowlands landfills no later than July 31, 1987. (73a). The County sought an emergency solution to this crisis, since it had no place to take its municipal waste and its planned resource recovery facility would not be operational until September 1, 1990, at the earliest. (4a). It proposed, as its interim solution, the construction of solid waste transfer stations. (4a).

SWTR's investors negotiated with the County for a contract, which they received on July 1, 1987. (108a). In order to win this contract, SWTR had to best seven other prospective vendors. (24a). The SWTR/Essex contract contained a fixed-price for SWTR's services, subject to annual adjustments linked to the Consumer Price Index ("CPI"). After they received a contract, and in reliance on the contract, SWTR's investors committed approximately $3.5 million in personal funds to the project and authorized the immediate construction of a building and facility. (114-115a; 207-207a). SWTR, through the perserverence and efforts of its investors, was ready a mere month later to accept 2,600 tons of solid waste every day, alleviating the County's solid waste crisis.

After all this was done, the State announced that the County was not bound by contract rates, and approved rates that failed to return to SWTR's investors their principal, let alone profit. The state approved SWTR's base rate, but did not approve the CPI-adjusted rates billed for 1988-89 and 1989-90, leaving SWTR in an operational deficit. (210a). The State of New Jersey thereby permitted the County to confiscate SWTR's investment in the name of the "public good." In 1991, four years after SWTR began providing service, the

state rejected the rates billed by SWTR and relieved the County of the obligation to pay them. (52a). The state intentionally left SWTR with an operational deficit of over $2,000,000, an enormous loss for SWTR's investors to absorb. (210a).

SWTR's rates, even if adjusted in accordance with the CPI, were the lowest rates in New Jersey for comprehensive transfer station services. (131-133a).[1] The state approved rates significantly higher, along with automatic annual increases, for other transfer stations in New Jersey. (131-133a). In Essex County, however, the County's authorization of the transfer station program angered the City of Newark, its largest municipality, and the issue became political. After Newark failed to stop the construction of the transfer stations through litigation, *see City of Newark v. Essex County Board of Chosen Freeholders*, 221 N.J.Super. 558, 535 A.2d 517 (App. Div. 1987), *app. dismissed*, 114 N.J. 301, 554 A.2d 854 (1988), it intervened in the proceedings below seeking state regulators to reject the SWTR contract,[2] infusing politics into this case.

The State of New Jersey violated the United States Constitution in the manner by which it regulated SWTR's rates. The state reviewed and approved SWTR's expense structure

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[1] The Essex County tipping fee for Type 10 waste was $102.15 per ton, the lowest in the state for comprehensive transfer station services. The tipping fees for two counties, Mercer and Passaic, did not include disposal costs. (131-133a). The Essex rates were therefore the lowest in the state for "comprehensive" services. *Id.*

[2] Newark's political lobbying eventually prevailed within the County. Essex, as a party to the contract, was obligated to seek the BPU's approval. It filed a petition with the BPU for acceptance of the contract, and the matter proceeded under the caption *In the Matter of the Petition of Essex County*. During these proceedings, Essex switched sides, *after receiving SWTR's performance*, and adopted Newark's position that the CPI-adjusters should not be enforced. This type of conduct by public officials must be condemned by this Court.

Essex's petition has been denied, but it will nonetheless appear before this Court and argue that its petition was properly denied.

in its entirety (52-55a), which means that SWTR did not mismanage itself into deficit. But then the state fixed rates that were demonstrably insufficient for SWTR to pay even these approved expenses. Without adequate revenues to cover its costs of operation, SWTR's investment was forfeited. The Constitution cannot condone the result: SWTR was left in deficit simply for paying for approved expenses, and the state thus compelled its four investors to subsidize the County's costs for transfer station services.[3]

SWTR arrives at this Court to request that it remedy this injustice. The regulators and courts below have flatly ignored, without response, SWTR's constitutional arguments. Their holdings were made in open defiance of this Court's precedent. With nowhere left to go, SWTR comes to this Court to vindicate its constitutional rights.

B. SWTR'S ARGUMENTS AND THEIR TREATMENT BELOW

At all levels of review of this matter, SWTR has argued that its property rights have been unconstitutionally infringed. Neither the regulators nor the courts have addressed these arguments in any of their written decisions.

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[3] The BPU order is a contradiction in itself. In one breath, the BPU stated, falsely, that SWTR limited its case to proofs suggesting that because its contract was competitively procured, it should be approved (52a). But the BPU then turned around and discussed SWTR's cost-of-service proofs.

The respondents in their arguments below repeated time and again that SWTR argued only that its contract was competitively procured, and that it did not place into evidence any other proofs. The respondents have misled every tribunal they have been before. SWTR produced a full cost-of-service case, and corroborated the reasonableness of its competitively procured rates by a cost-of-service analysis. The Administrative Law Judge, in upholding the SWTR contract in its entirety, ruled that SWTR's rates were reasonable from a competitive market analysis, a cost-of-service analysis, and from a comparable rate analysis. (181a: 192a; *see* 205a).

SWTR argued in the Appellate Division, repeating the arguments made before the BPU and DEP, that it "was denied its constitutional and statutory rights to a fair projected return in violation of its constitutional rights to procedural and substantive due process." (SWTR Appeal Brief, July 7, 1995, pp.38-41). It argued that it had been unconstitutionally left in an operational deficit, and that it could not be legally regulated into deficit. (*Id.*). The BPU and DEP never addressed this argument or considered the constitutional problems with its proposed regulation. The Appellate Division did not address SWTR's position, avoiding the issue altogether with the remarkably incorrect observation that SWTR did not "urge that [its] financial health has been jeopardized by the Board's action or by the DEPE in rejecting the CPI-based automatic increases." (A-24).

Within the context of its due process objections, SWTR argued that it further offended the constitution for the state to deprive "SWTR, on a retroactive basis, of the benefit of a material and non-severable [pricing] term negotiated in good faith and in consideration for SWTR's acceptance of this risks evident in the agreement." (SWTR Appeal Brief, July 7, 1995, p.39). SWTR argued that to sever the pricing term defeated the value of the contract, and if the regulators were to sever the CPI-pricing terms, then they must otherwise act to compensate SWTR for this taking. These same arguments were made to the BPU and DEP. Neither the regulators nor the courts addressed these arguments in their written decisions. They simply took the CPI-pricing terms away, after performance and without compensation.

SWTR also argued to the BPU, DEP, and Appellate Division that the state violated its due process rights by enforcing an asserted public policy barring enforcement of inflation-linked contractual adjustments selectively against SWTR. It argued that "contract utilities such as SWTR have routinely enforced their contractual CPI or other inflationary increases without question by the regulators." (SWTR Appeal Brief, July 7, 1995, p. 28). In New Jersey, there has never been any policy barring enforcement of inflation-linked adjustment

clauses in utility contracts. The parties will be speechless before this Court to cite even one other example, prior or subsequent, where the asserted policy against CPI-linked adjusters in a utility contract has been enforced. The Appellate Division declined to consider the constitutional dimensions of this problem, writing that "[r]eliance by . . . SWTR on other instances where CPI-based automatic escalators have been allowed is not persuasive" and that "[e]ach case must rest upon its own peculiar facts." (A-22). The Appellate Division's cursory treatment of SWTR's argument provided no clue as to what "peculiar facts" or rational basis justified excision of SWTR's pricing terms when other vendors have been allowed to enforce similar terms.

REASONS FOR GRANTING THE WRIT

I

THE STATE'S REGULATION OF SWTR IS UNCONSTITUTIONAL IN THAT IT PRACTICALLY DEPRIVED SWTR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW

Long ago this Court cautioned that the power to regulate is not the power to destroy. *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886). The "guiding principle" of utility regulation is that a utility commission is constitutionally prohibited from setting a rate for service that is confiscatory of the utility's property rights. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *In re Instrastate Industrial Sand Rates*, 66 N.J. 12, 23-24, 327 A.2d 427 (1974), *citing*, *Great Northern Railroad Co. v. State of Washington*, 300 U.S. 154 (1936). "A rate is too low if it so 'unjust as to destroy the value of the property for which it was acquired' and in doing so 'practically deprive[s] the owner of the property without due process of law.'" *Duquesne Light*, 488 U.S. at 307-08, *quoting*, *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896). In order to meet constitutional requirements, a utility commission must provide for a return sufficient to "(1) assure confidence in the financial soundness of the utility; (2) maintain and support the

utility's credit; (3) enable the company to attract capital necessary to provide service; and (4) maintain the integrity of existing service." *Petition of Elizabethtown Water Co.*, 107 N.J. 440, 453-454, 527 A.2d 354 (1987), *citing*, *Bluefield Water Works & Improvement Co. v. Public Service Commissioner of West Virginia*, 262 U.S. 679, 693 (1923). Where "the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light*, 488 U.S. at 308.

The state regulated SWTR without regard to these constitutional precepts. A thorough review of the regulatory orders and the Appellate Division decision reveals that none of these tribunals concerned themselves in the least with the financial repercussions of their excision of the CPI provisions from the SWTR contract. In fact, the only comment along the way that pertained to SWTR's financial health was the Appellate Division's remarkable claim that SWTR did not urge financial injury, an observation made in a vacuum given the enormous amount of *undisputed* evidence of SWTR's financial harm and the passion of its constitutional arguments. SWTR respectfully submits that the state's right to regulate utility rates invokes not only a duty to protect the public, but a responsibility to protect the utility as well. The regulation here is all one sided. No hint of concern for SWTR's financial health is found in any of the decisions under review.

A. SWTR OPERATED IN A DEFICIT

That SWTR operated in a deficit is undisputed by the parties. SWTR produced its accountant, Dr. Joseph Mauriello, a prominent accountant and a full professor retired from the faculties of the New York University and Seton Hall University business schools, to testify as to SWTR's financial health. (212a). He testified that, from the outset, the extreme risk inherent in the SWTR contract was evident to commercial lenders and banks, which refused to lend SWTR the capital necessary to initiate the project. (206a). Without the availability of these sources of capital, Dr. Mauriello secured

financing from private sources. (206a). He and Mark Mauriello personally financed the engineering, travel, and other expenses incurred by SWTR until it was capitalized through investment and personal loans made by the shareholders. By the end of June 1987, SWTR had incurred debt through private sources in the approximate amount of $2,000,000. (206a). SWTR agreed to repay principal with a $1.35 million payment by September 1, 1989, and additional $1.35 million payment by December 31, 1990, and $516,000 by the end of the project. (206-207a). The amount of principal to be repaid exceeded $2,000,000 because Joseph Mauriello loaned SWTR an additional $1.35 million in December 1987, and Mark Mauriello advanced an additional $170,000 on another loan. (206-207a). Therefore, investment in SWTR totalled well over $3.5 million.

At the time of the OAL hearings, Dr. Mauriello testified that SWTR needed additional revenue *before* depreciation of $2,722,569 prior to September 1, 1990 just to break even in its first three years. (210a). Also at the time of the OAL hearings, SWTR had billed for CPI increases in the amount of $3,427,493, exclusive of interest, which the County refused to pay. (50a). If SWTR were to be awarded those amounts, it would have shown a profit, before depreciation, of $704,924 for the first three years -- the difference between the CPI increases, as billed, and the $2,722,569 required to break even. This amounts to a profit of $234,974 per year to be split among its investors, and even less when depreciation is factored. Given an investment of $3,500,000, this amounts to an annual return, before depreciation, of less than seven percent, hardly a lucrative return in light of the risks associated with the investment.

Dr. Mauriello's opinion as to the financial injury suffered by SWTR was undisputed. No party disputed the fact of SWTR's deficit. SWTR served Dr. Mauriello's pre-filed testimony prior to the hearings and, as noted by the Administrative Law Judge, the parties were afforded full discovery of SWTR's financial records. (190-191a). No party countered Dr. Mauriello's opinion with contrary testimony, an implicit

concession of its accuracy. In assessing Dr. Mauriello's testimony, the Administrative Law Judge lauded his expertise, credibility, and forthrightness. (191a). While the parties have summarily argued in post-hearing submissions that Dr. Mauriello should be disbelieved, they offered, and continue to offer, nothing of evidentiary substance. They had a fair opportunity to be heard on SWTR's financial health, but could not find even a single accountant who would challenge Dr. Mauriello's testimony.

B. SWTR'S EXPENSES WERE APPROVED AS REASONABLE

Rather than confront Dr. Mauriello on SWTR's deficit, the parties sought to suggest that SWTR caused this injury through its maintenance of an unreasonable expense structure. They argued that SWTR was accordingly not entitled to rate relief. The parties specifically targeted SWTR's processing fees, rental costs, and transportation costs, suggesting that SWTR paid too much for each service. In her thorough opinion, the Administrative Law Judge carefully considered these arguments but ultimately concluded that SWTR's expenses were reasonable. (181-182a). The BPU and DEP affirmed these findings of the Administrative Law Judge, concluding that adjustments to SWTR's expenses were not warranted. (53-55a).

C. SWTR'S RATE IS CONFISCATORY

Based on the foregoing, it is beyond serious dispute that the state fixed a rate for SWTR that was insufficient to provide for its costs of service. SWTR respectfully submits that a rate that does not even cover a utility's approved expenses is confiscatory within the meaning of this Court's precedents. In fixing a rate so insufficient that SWTR could not even meet its approved expenses, the state neither assured confidence in the financial soundness of SWTR, nor maintained and supported SWTR's credit, nor enabled SWTR to attract capital necessary to provide service, nor maintained the integrity of SWTR's existing service. *Petition of Elizabethtown Water Co.*, 107 N.J. 440, 453-454 (1987), *citing*, *Bluefield Water*

Works & Improvement Co. v. Public Service Commissioner of West Virginia, 262 U.S. 679, 693 (1923). On all accounts the state failed to adhere to its constitutional obligations to SWTR. By definition, SWTR's rate, without collection of the billed CPI increases, was confiscatory.

II

THE STATE'S ELECTION TO SEVER A MATERIAL PRICING TERM AFTER PERFORMANCE AND WITHOUT PROVIDING ANY COMPENSATION FOR THIS TAKING IS UNCONSTITUTIONAL

On August 6, 1991, the BPU first held that the pricing terms of the SWTR contract could not be enforced because of an asserted policy barring the enforcement of inflation-linked adjusters in utility contracts in the absence of a proven nexus between the inflationary index and the cost components of the utility. (50-52a). Based on that asserted policy, the BPU excised the CPI clauses from the SWTR contract and relieved the County of its obligation to pay the CPI increases that SWTR had billed. SWTR submits, even if this policy were valid, the severance from a utility contract of a material pricing term that meant the difference between bare profitability and extreme deficit is unconstitutional where no compensation is given for the government taking. *See Duquesne Light*, 488 U.S. at 310, *quoting*, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("it is not theory but the impact of the rate order which counts").

Whatever ill may be associated by the state with inflation-linked escalators, the state's conduct in striking the clause without compensation is many times more prejudicial to the public interest that enforcement of the escalator clauses. In *Permian Basin Area Rates Cases*, 390 U.S. 747 *reh. den.* 392 U.S. 917 (1968), this Court acknowledged that, under familiar principles of contract law, an excision of a material pricing term from an agreement utterly destroys the value of the contract. *Id.*, at 783, *citing*, *I/M/O Pure Oil Co.*, 25 F.P.C. 383, 38 P.U.R.3d 125 (Fed. Power Commission 1961). This Court in *Permian Basin Area Rate Cases* discussed with approval

the Federal Power Commission's holding in *Pure Oil*, where the commission expressed concern with "infinite escalation clauses" but declined to strike clauses in existing contracts because "this would prove 'many times' more prejudicial to the public interest than would the escalation clauses." *Permian Basin Area Rate Cases*, 390 U.S. at 783, *citing*, *Pure Oil*, 25 F.P.C. at 388-89.[4]

In striking a clause that meant the difference between profitability and non-profitability, the state took property without compensation. The state could not sever the SWTR pricing terms unless it acted to compensate SWTR by readjusting the risk allocation of the contract to provide for relief for the injury that the severance created, because otherwise the effect of the rate order is confiscatory. *See Duquesne Light*, 488 U.S. at 310; *Hope Natural Gas*, 320 U.S. at 602. Although the SWTR pricing term was severed from the contract, neither the agencies nor the courts thereafter undertook any discussion as to how SWTR should be compensated for the governmental action causing destruction to the value of its contract and leaving SWTR in an operational deficit.

The prejudice to SWTR is even more acute since SWTR had already performed when the BPU, in 1991, acted to deny SWTR the benefit of its contract. By August 1991, SWTR had incurred enormous expense on behalf of the County that the BPU determined should go uncompensated in an opinion that demonstrated an outright hostility to the CPI adjusters. (50-51a). But on February 10, 1989, the BPU had written in

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[4] This Court in *Permian Basin Area Rate Cases* upheld the Commission's distinction between its action in *Pure Oil*, where it declined to destroy the value of existing contracts by severing a material pricing term that included automatic price escalators, and the case before it, where the Commission limited application of three-specific type of automatic escalators in intrastate gas contracts in the Permian Basin area so that in no event could a rate exceed the maximum rates the Commission had fixed. *Permian Basin Area Rate Cases*, 390 U.S. at 782. SWTR's case squarely fits within the parameter of *Pure Oil*, since this case involves a total excision, not limitation, of a material pricing term.

an interlocutory order in this case discussing the enforceability of the CPI clauses: "Assuming, *arguendo*, that the basic contract service fees and the CPI increase are determined to be reasonable, we agree with [Waste Management] that it will be entitled to recover the CPI increase from Essex unhampered by [the ban on retroactive ratemaking"]. If a policy hostile to CPI adjusters actually existed, then the BPU should have articulated that policy in the February 1989 order.

Finally, the SWTR contract did not provide for "annual increases" as misstated by the Appellate Division. It provided for annual adjustments to the base rate according to a formula that allowed for the rate to be adjusted at 106 percent of the CPI for the eleven-month period from January through November of the preceding year.[5] Although the parties have called the SWTR term an "annual increase," and the Appellate Division followed suit, SWTR's price would have actually decreased in the event of deflation. Can there be any doubt that the SWTR contract would have been approved by the BPU in August 1991 if there had been deflation in 1988 and 1989? *See Duquesne Light*, 488 U.S. at 315 (1989) (regulation that "required investors to bear the risk of bad investments at some times while denying the benefit of good investments at others would raise serious constitutional questions."). This is the danger posed when the regulator arrogates the right to decide, after performance, whether an inflationary-linked adjuster can be enforced.

III

THE STATE'S SELECTIVE REFUSAL TO ENFORCE THE SWTR CPI-LINKED ADJUSTER IS UNCONSTITUTIONAL

In violation of its rights to due process and equal protection, SWTR has received disparate treatment at the hands of

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[5] This approximates an adjustment of 100 percent of the CPI for a twelve-month period and allowed the County to know in advance of the new year what the rate would be as of the following August 1.

the state. No rational basis has ever been articulated for this disparity of treatment. While the state talks of "well established" policy generally barring enforcement of inflation-linked adjusters, its actions speak louder than its words. In *In the Matter of the Petition of the Union County Utilities Authority*, Docket No. CT05593003 (January 14, 1994) (Appendix "F"), the DEP accepted the contract between the Union County Utilities Authority and a vendor that included a CPI-linked adjuster. This occurred seven months before the DEP's reaffirmation of the BPU's rejection of the CPI in this case based on alleged well established policy. The state has sought to distinguish this case from the Union County case by suggesting that the CPI adjuster in that case passed muster because any increase was capped by four percent. This is not a rational distinction. SWTR has suggested that its increases could have been likewise capped at four percent, but the state has insisted on a total forfeiture of SWTR's CPI clause.

In *In the Matter of the Application of SES Gloucester*, BPU Docket No. SE85100984 (October 21, 1987) (Appendix "G"), the state approved Gloucester County's contract with a resource recovery facility that included annual adjustments in accordance with the Producer Price Index ("PPI"). The state's distinction is that the PPI was permitted in that case because there is a nexus between the cost components of a resource recovery facility and the PPI. Initially, this is a revisionist spin on the decision nowhere evident in the BPU's actual text. It was first advanced years later as the pretext to deny SWTR the right to enforce its inflation-linked escalators. In any event the state's distinction is pure fiction. The PPI is a Bureau of Labor statistic measuring changes in wholesale prices "received by domestic producers of commodities in all stages of processing." *Bataco Industries, Inc. v. United States of America*, 29 Fed.Cl. 318, 319 (Claims Court 1993). The SES Gloucester facility is a resource recovery plant that collects solid waste and burns it. It is neither a user of unfinished goods or commodities, nor obviously the producer of goods or commodities.

The state argues that in *SES Gloucester* it permitted the inflation-linked adjuster, but coupled with an on-going earnings analysis. SWTR has argued that its CPI adjusters could likewise be approved coupled with an on-going earnings analysis. The state declined to accept this proposal.

Perhaps the disparity of treatment between SWTR and other vendors is best underscored by the BPU's decision in *In the Matter of the Application of Passaic County Utilities Authority*, BPU Docket No. S08704360 (October 26, 1987) (Appendix "H"). In that case, the BPU approved the Passaic County transfer station contracts, inclusive of annual automatic increases, simply because they were negotiated at arm's length in a competitive market. This is the case that should guide, because SWTR's contract was likewise negotiated competitively. The state has never offered any distinction between these two cases.

When push comes to shove, the respondents will be unable to cite to this Court even one other case where the state excised an inflation-linked adjuster from a utility contract under its jurisdiction. There is no policy in New Jersey barring inflation-linked adjusters, and there was no rational basis for it deny SWTR the right to enforce a clause that similarly situated parties routinely enforce. What clouded the proceedings below was the arbitrary political influence of Newark, not valid public policy.

CONCLUSION

Throughout this petition, SWTR actively sought to avoid hyperbole, but the degree to which the state has ignored its constitutional rights is shocking. The state cannot legally regulate SWTR into deficit in the manner accomplished by the State of New Jersey. The state provided SWTR with no assurance of confidence in its financial soundness. It rescinded a material pricing term of the SWTR contract, but made no adjustment for this taking even though this action destroyed the value of the contract. The state fixed a rate for services insufficient for SWTR to even meet operating expenses -- expenses that the state had approved in their

entirety. It thus confiscated the investment in SWTR, leaving its investors to subsidize the County's costs for transfer station services. SWTR did not just receive a raw deal, it received an unconstitutional raw deal.

Even more shocking is that the New Jersey courts have turned a blind eye to these constitutional lapses. If the constitution of this nation is to continue to protect its citizens, then it must be enforced. No constitutional error is evident in the Appellate Division decision, but that is only because the court, like the regulators before it, ignored the facts underscoring the constitutional dimensions of this case. That does not make what occurred any less of a constitutional violation. In this land government cannot confiscate private investment. A clear constitutional violation occurred in this case. SWTR's right to relief must be worth more than expedient political solutions.

For the reasons express in this Petition, SWTR respectfully requests that this Court issue a writ of certiorari to review the Appellate Division's decision, that it reverse that court's determination, and that it remand for entry of a judgment in favor of SWTR in the amount of $3,427,493, plus lawful interest.

Respectfully submitted,

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Appendix A

SUPREME COURT OF NEW JERSEY
C-2 September Term 1997
44,046

IN THE MATTER OF THE PETITION OF THE COUNTY OF ESSEX (1) FOR APPROVAL and CONTINUATION OF INTERIM SOLID WASTE DISPOSAL RATES; and (2) FOR APPROVAL OF A CUBIC YARD CONVERSION RATIO OF A 3:1.

(SOLID WASTE TRANSFER & RECYCLING, INC., -Petitioner)

ON PETITION FOR CERTIFICATION

FILED

SEP 8 1997

Stephen Townsend

CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-351-94 having been submitted to this Court, and the Court having considered the same:

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 4th day of September, 1997.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Stephen Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

Appendix B

IN THE MATTER OF THE PETITION OF THE COUNTY OF ESSEX (1) FOR APPROVAL AND CONTINUATION OF INTERIM SOLID WASTE DISPOSAL RATES; AND (2) FOR APPROVAL OF A CUBIC YARD CONVERSION RATION OF 3:1.

Superior Court of New Jersey
Appellate Division

Argued January 21, 1997—Decided April 10, 1997.

Before Judges PETRELLA, WALLACE and KIMMELMAN.

I. Leo Motiuk, argued the cause for Solid Waste Transfer and Recycling Inc., appellant/cross-respondent in A-351-94T3 and respondent in A-522-94T1 (*Shanley & Fisher*, attorneys; *Mr. Motiuk* and *Joseph M. Cerra*, on the brief).

Sandra T. Ayres argued the cause for Waste Management of New Jersey, appellant in A-522-94T1 and respondent in A-351-94T3 (*Schwartz, Tobia & Stanziale, P.A.*, attorneys; *Ms. Ayres*, on the brief).

Carla V. Bello, Senior Deputy Attorney General, argued the cause for Department of Environmental Protection and Energy, respondent in A-351-94T3 and A-522-94T1 (*Peter Verniero*, Attorney General, attorney; *Andrea M. Silkowitz*, Assistant Attorney General, of counsel; *Ms. Bello*, on the brief).

Benjamin Clarke argued the cause for County of Essex, respondent in A-351-94T3 and A-522-94T1 (*DeCotiis, Fitzpatrick & Gluck*, attorneys; *Eric D. Wisler, Teaneck*, of counsel; *Mr. Clarke* on the brief).

William J. Schwartz, Assistant Corporation Counsel, argued the cause for City of Newark, intervenor-respondent/cross-appellant in A-351-94T3 and A-522-94T1 (*Michelle Hollar-Gregory*, Corporation Counsel, attorney; *Mr. Schwartz*, on the brief).

Department of the Public Advocate, attorney for Division of Rate Counsel, respondent in A-351-94T3 and A-522-94T1 (*James McGuire*, of counsel and on the brief).

KIMMELMAN, J.A.D.

The appeal from the August 23, 1994, final order of the Department of Environmental Protection and Energy (DEPE) by Waste Management of New Jersey, Inc., (WM) under Docket No. A-0522-94T1 and the appeal and cross-appeal of the same order by Solid Waste Transfer and Recycling, Inc., (SWTR) and the City of Newark, respectively, under Docket No. A-0351-94T3 have been consolidated for the purpose of this opinion.

The principal legal issue involved in both appeals focuses upon the propriety of applying automatic annual incremental increases, based upon the Consumer Price Index (CPI), to the rates being charged Essex County (Essex or County) by WM and SWTR, the operators of two solid waste transfer stations in the City of Newark (Newark). Analysis of this issue depends upon whether interim acceptance, under emergency conditions, by the Board of Public Utilities[1] (Board) of the contracts entered into by WM and SWTR with the County for

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[1] On August 19, 1991, the Board of Public Utilities was redesignated as the Board of Regulatory Commissioners, and at the same time, the Department of Environmental Protection (DEP) became the Department of Environmental Protection and Energy. *See N.J.S.A.* 13:1D-1 (1991) which sets forth in full Reorganization Plan No. 002-1991. On July 4, 1994, the Department of Environmental Protection and Energy was renamed the Department of Environmental Protection, and the Board of Regulatory Commissioners was redesignated the Board of Public Utilities pursuant to Reorganization Plan No. 001-1994. *See N.J.S.A.* 13:1D-1 (West Supp.1996).

During the course of the administrative proceedings below, between the dates of August 19, 1991, and July 4, 1994, the Department of Environmental Protection and Energy (DEPE) took over duties of the Board. The proceedings resulting in the final order under appeal, dated August 23, 1994, were commenced during the interval when the DEP functioned as the DEPE.

the operation of the transfer stations should be construed as having firmly resolved the enforceability of the CPI-based automatic rate increase clause in each contract. Other issues involve whether SWTR is entitled to compensation due to solid waste tonnage shortfalls and whether WM is entitled to interest on claims against the County resolved in its favor for $4,841,930 in tonnage shortfall adjustments and for $1,065,746 in landfill taxes paid by it.

I

By way of background, it appears that for many years, solid waste emanating from Essex County and other adjacent northern New Jersey counties had been disposed of at landfills located in the Hackensack Meadowlands (Meadowlands) and operated by the Hackensack Meadowlands Development Commission. As the Meadowlands neared its capacity, the counties using its facilities were directed to make alternative arrangements.

In earlier litigation, a court order was entered in 1982, and amended in 1983, requiring Essex County to cease all use of the Meadowlands landfill facilities after July 31, 1987. It was contemplated that the County would develop and construct a resource recovery facility for its waste and that such facility would be operational on or about the January 31, 1987, cut-off date. Unfortunately, the construction plans for the County's resource recovery facility were delayed and the facility was not scheduled to be operational until sometime in 1990. Because the Meadowlands landfills were to close on July 31, 1987, the County proposed an emergency interim plan whereby it would undertake to solicit companies engaged in solid waste collection and disposal who would be interested in the construction and operation of temporary transfer stations, that is, facilities where collection trucks empty their loads of solid waste for loading onto larger trucks or railway cars and transfer to out-of-state disposal sites.

In December 1986, the County issued a solicitation of interest seeking proposals for the establishment of one or more solid waste stations to operate on an interim basis for

approximately three years until the County's resource recovery facility became operational. It was noted that any proposed transfer station would need DEP approval and that the rates or tariffs to be charged would need approval by the Board. Approximately 100 solicitations were mailed out to prospective operators and advertisements were placed in trade journals as well as in the *Star Ledger*. Nine companies responded and ultimately the responses were narrowed down to two companies based on suitability of the site proposed, access to transportation networks, and readiness of structures already in place at the sites. The County informed the DEP of the preferential proposals submitted by WM and SWTR.

At the behest of the DEP and the County, Governor Kean issued an emergency declaration which enabled the DEP to circumvent the lengthy process for initiating transfer station approval. The DEP was then able to issue the necessary performance permits so that WM and SWTR could operate as licensed handlers of solid waste. Meanwhile, the County had commenced extensive contract negotiations with WM and SWTR and settled upon three solid waste transfer sites, two in Newark and one in Orange. At a later date, the site in Orange was eliminated because the solid waste capacity was adequate at the two Newark sites. The tariff rates to be charged by WM and SWTR for each ton of waste received were finally settled upon and each appellant executed a detailed written agreement with the County on July 1, 1987. Specific provisions of each contract such as the automatic CPI-based escalator clause and the standard clause that each contract was to be governed and construed pursuant to the laws of the State of New Jersey are the principal focus of this appeal.

The contracts were awarded and executed by the County not as a result of competitive bidding normally required by the Local Public Contracts Law (LPCL), *N.J.S.A.* 40A:11-1 to 40A:11-49, but rather under the emergency bidding exception contained in *N.J.S.A.* 40A:11-6. Newark immediately filed a complaint in lieu of prerogative writs in the Law Division challenging the construction and operation of the two waste transfer facilities by WM and SWTR, contending that the July

1, 1987, transfer station contracts were void because they were not awarded in compliance with the public bidding provisions of the LPCL. Newark's position was that the County was not entitled to invoke the emergency public health, safety, or welfare provisions of *N.J.S.A.* 40A:11-6 because the County had intentionally created the emergency by not earlier resolving the problem of lack of solid waste facilities. On the return date of an order to show cause, the Law Division judge refused to restrain the continued construction of the transfer stations but, on motion of the DEP and because a final administrative order was involved, did transfer the matter to the Appellate Division. In a very thorough opinion by Judge Dreier which recounted the historical background of this matter, this court held that WM's and SWTR's contracts with the County were lawfully negotiated and awarded pursuant to the emergency bidding exception of the LPCL. *See Newark v. Essex County Bd. of Chosen Freeholders*, 221 *N.J.Super.* 558, 535 *A.*2d 517 (App.Div.1987).

The two transfer stations located in Newark were constructed and became operational on time but are no longer in use.

II

Initial regulatory approval was sought when, on July 16, 1987, the County filed an application with the Board for Certificates of Public Convenience and Necessity for three solid waste transfer stations (later amended to include only the two stations in Newark). The County further sought approval of the contracts it had entered into with WM and SWTR and sought approval of the tariff rates representing the charges to the County as set forth in such contracts. This expedited interim approval was requested because of the approaching July 31, 1987, Meadowlands closure deadline.

The Board held a public hearing on July 28, 1987, and, on July 31, 1987, ordered that Certificates of Public Convenience and Necessity be issued to the County and sub-certificates be issued to WM and SWTR for the transfer stations involved. In the same order, the Board emphasized the "emergent nature"

of the County's petition and said "the Board *HEREBY ACCEPTS* the Contracts [between the County and WM and SWTR] . . . ." The Board approved, on an "interim, initial, emergent" basis, the tariff rates submitted by the County and specifically provided:

> "Operations authorized herein are subject to the rights and duties of public utilities as set forth in Title 48 *New Jersey Statutes Annotated* and the *New Jersey Administrative Code* applicable to public utilities."

On February 4, 1988, the County filed a supplemental petition with the Board for final approval of the interim initial tariff rates "subject to this Board's continuing rate-making review and jurisdiction . . . ." On May 2, 1988, the Board transferred the matter to the Office of Administrative Law (OAL) as a contested case. In that proceeding, Newark sought to compel WM and SWTR to respond to discovery requests but the Administrative Law Judge (ALJ) ruled that WM and SWTR were not parties to the proceeding and should not be joined. Consequently, an interlocutory application was made by Newark to have the Board review the ALJ's ruling.

On August 5, 1988, the Board, by an order signed by its then president, Christine Todd Whitman, joined WM and SWTR as parties in the case and made clear that it regarded WM and SWTR and the transfer stations operated by these appellants to be public utilities. The order was significant and far reaching for the purposes of this appeal and provided, in pertinent part, as follows:

> The solid waste disposal rates which Essex seeks to have approved are based almost entirely upon the service fees or charges to Essex contained in certain lengthy contracts between it and the respective Transfer Stations pursuant to which the Transfer Stations furnish solid waste disposal service to Essex.
>
> . . . .

The contracts are complex. They were negotiated in reliance upon the emergency provisions of the Local Public Contracts Law, *N.J.S.A.* 40A:11-1, *et seq.*. . . .

. . . .

The rates in question are "initial rates" and as such did not and do not require hearings to become effective. However, as indicated by the Board at its hearing concerning the petition of Essex held July 28, 1987, further hearings would be held in the future to consider the reasonableness of any rate that would be set. And, as stated by the Board in its Order of July 31, 1987, the rates were approved by the Board as "interim, initial emergent tariff rate(s)" on an "interim and subject to refund" basis. The Board, therefore, clearly indicated in the hearing and in the Order that the rates would be subject to subsequent hearing and scrutiny and, if warranted, refund. To achieve such scrutiny the Board transmitted the petition for their final approval to the Office of Administrative Law (OAL) for hearings and examination with respect to the reasonableness thereof.

Approximately 98% of the rates is made up of the monies paid by Essex to the Transfer Stations pursuant to said contracts. If the contracts, and the charges to Essex made thereunder, are considered sacrosanct or unreviewable by the Board, as Waste Management would have it, there can be no effective examination of Essex's solid waste disposal rates. This is not what the Board intended, and not what the public good requires.

In her July 12, 1988, memoralization [sic] of the ruling under interlocutory review, the ALJ correctly inferred that the Board has deemed the Transfer Stations to be public utilities subject to its general jurisdiction under *N.J.S.A.* 48:2-13. Any solid waste

facility, including a transfer station, constructed or operated pursuant to the provisions of the Solid Waste Management Act, *N.J.S.A.* 13:1E-1, *et seq.*, shall be deemed a public utility and shall be subject to the rules and regulations of the Board. *N.J.S.A.* 13:1E-27. The Transfer Stations each hold a Certificate of Public Convenience and Necessity to engage in the business of solid waste disposal and, if [sic] fact, are so engaged. It would be unlawful for them to be engaged in the solid waste disposal business unless they held certificates. *N.J.S.A.* 48:13A-6.

In light of these statutes the argument of Waste Management that it did not seek a Sub-Certificate to engage in solid waste disposal, that it did not and does not consider itself a public utility and that it is a "private vendor", rather than a public utility, is of no consequence. As public utilities, the Transfer Stations must bear the burden of justifying the reasonableness of their rates, i.e., the service fees and charges to Essex under the contracts. *Central R. Co. of N.J. v. Dept. of Public Utilities, 7 N.J.* 247, 81 *A.*2d 162 (1951). Such contracts, although their provisions were agreed upon by the Transfer Stations and Essex, are nevertheless subject to modification by the Board in the public interest. When the state, through the Board, exercises its soverign [sic] power over rates, the contract rights of the parties must yield. *Application of Borough of Saddle River, 71 N.J.* 14 (1976) at p. 23 [362 *A.*2d 552].

. . . .

In this proceeding complete relief, i.e., a determination of the reasonableness of the interim, emergent, initial rates charged by Essex for solid waste disposal and, if warranted, a refund of a part of such rates, cannot be accorded among those already parties, i.e., Essex, Newark and other municipalities,

> the Department of the Public Advocate, Division of Rate Counsel, and Board Staff, unless the Transfer Stations are joined as parties. It is the Transfer Stations and the Transfer Stations alone, that possess most if not essentially all of the information needed to determine the reasonableness of the rates; the service fees or charges to Essex under said contracts comprise nearly the whole of the rate which is in turn charged by Essex to the people of Essex County for solid waste disposal. Under such circumstances we cannot blindly accept such fees and charges as a given.

WM sought a stay of the Board's August 5, 1988, ruling and sought an administrative hearing regarding its status as a public utility. On September 14, 1988, the Board denied such requests.

Shortly thereafter, the County filed with the Board a supplement to its tariff rate petition which was pending before the OAL whereby the County sought to include in its rates a CPI-based escalator clause increase of 5.36% which WM had requested pursuant to Article V B(3) of its July 1, 1987, transfer station contract with the County. The contractual provision relating to the CPI-based increase provided:

> The Service Fee for Acceptable Waste . . . shall be increased each Contract Year to reflect 106% of the percentage increase since January 1 of the preceeding [sic] year in the CPI-U for New York/Northern New Jersey . . . .

The County took the position that Board approval was needed because no service fee increase could be paid by it to WM, except from tipping fees which also are required to be approved by the Board. Concurrently, Newark sought from the Board a declaratory order that no adjustments in tipping fees, rates, or charges could be made without prior authorization and approval by the Board.

On January 4, 1989, the Board addressed the CPI issue by clarifying its prior order of July 31, 1987, as follows:

> Upon review of the above language, we see that its [sic] raises the question of whether the Board's "acceptance" of the contract between Waste Management and Essex constituted not only an acceptance of Waste Management's initial service fees to Essex provided for therein but also an acceptance of increases in the service fees or charges based upon the CPI escalator clause of the contract, Article V, paragraph B.(3).
>
> . . . .
>
> The Board's acceptance of Essex's contracts with the Transfer Stations and, by implication, the service fees or charges therein, was "based upon . . . the emergent nature" of Essex's petition. Under such circumstances, while not as clearly spelled out in our Order of July 31, 1987, as in retrospect it might have been, our acceptance of the contracts was, as in the case of Essex's rates, on an "interim, initial basis."
>
> The Board has not yet made a determination of the reasonableness of Waste Management's interim, initial service fees. Until such time as they and the CPI escalation clause have been found to be reasonable the fees cannot be increased pursuant to that clause.

The Board then transferred the County's supplemental petition to the OAL to be made part of the rate proceeding. Subsequent requests to the County for CPI-based increases were made by both WM and SWTR. The County, in turn, filed further supplemental petitions for approval of the CPI-based increases.

WM sought a rehearing of the January 4, 1989, decision of the Board claiming (1) that the Board had engaged in retroactive rate making in rejecting the CPI-based automatic

increases in contract rate charges and (2) that WM was not a public utility but merely a contract vendor. The Board denied the request for a rehearing. WM sought leave to appeal and, ultimately, on June 27, 1989, the Supreme Court denied leave to appeal.

In an initial decision issued December 31, 1990, the ALJ upheld the July 1, 1987, contracts between the County and WM and SWTR and ruled that the contracts were negotiated at arm's length in a competitive market, were reasonable, and, that by reason thereof, the automatic CPI-based escalator clauses were enforceable.

By order entered August 8, 1991, the Board modified the ALJ's initial decision and held that the contracts were not the result of arm's-length negotiations in a competitive market. It determined that the negotiated contract rates approved as interim rates in its July 31, 1987, order were reasonable and would be allowed as final rates. Nevertheless, the Board concluded that the CPI-based automatic increases were not enforceable and said:

> [T]here are fundamental problems involved with linking rate increases at solid waste transfer stations to the CPI. The major components of transfer stations costs are depreciation, landfill disposal costs, transportation costs, return on investment and salaries. *These cost components do not automatically increase at the same rate as the CPI.* The record presented by the petitioners did not demonstrate a nexus between anticipated changes in transfer station operating costs and the CPI.
>
> [(Emphasis added).]

By way of further illustration, the Board made reference to safeguards it had built into prior cases in which escalator clauses had been permitted:

> [I]n *In the Matter of the Application of SES Gloucester*, BPU, Docket No. SE85100984, a case cited in support of the CPI-linked increases, we

accepted a Producer Price Index based escalation clause *only* after it was tied to a rate base/rate of return analysis and *coupled* with an ongoing annual earnings review. We also note that there exist escalator clauses in other contracts reviewed by this Board (e.g. contracts for resource recovery plants) but that such escalator clauses are tailored to reflect the type of costs associated with the particular operation. Thus, a "weighted" or "blended" escalation formula, which takes into consideration a variety of financial indices relevant to the subject matter under review, provides the necessary assurance of reasonableness in such circumstances.

Absent such safeguards, sound regulatory policy and law militates against automatic rate increase based upon CPI escalators. *The CPI reflected inflation in such areas as food, housing and electronic goods, and thus bears little relationship to increases in costs in the solid waste industry. Reflecting this policy, the Board has "consistently refused to recognize increases associated with general inflationary factors." See Petition of Elizabethtown Water Company,* 11 *N.J.A.R.* 303, 337 (N.J.B.P.U. 1984), *reversed on other grounds*, 205 *N.J.Super.* 528 [501 *A.*2d 567] (App.Div.1985), *affirmed as modified*, 107 *N.J. 440* [527 *A.*2d 354] (1987). *See Re Jersey Central Power & Light Company*, 65 PUR 4th 175 (N.J.B.P.U.1985); *Re Commonwealth Water Co.*, 7 PUR 4th 456 (N.J.B.P.U. 1974); *In re Otter Tail Power Co.*, 21 PUR 4th 254 (S.D.P.U.C.1977) "The effects of inflation on a company do not in any reasonably accurate manner parallel those contained in the [CPI]."

[(Emphasis added).]

In light of these concerns and in the absence of a record supporting the relationship between the automatic CPI-based increases and costs associated with transfer station operation,

the Board rejected the ALJ's acceptance of CPI-based automatic increases, and concluded:

> [B]ecause the transfer stations failed to create a record that would support an automatic rate increase tied to a consumer price index, or in the alternative, demonstrate known and measurable cost increases which could reasonably be foreseen, the transfer stations are not entitled to approval of the CPI-linked rate increases and we *REJECT* the ALJ's acceptance of such increases.
>
> [(Emphasis added).]

Both WM and SWTR sought a reconsideration of the Board's August 8, 1991, order which modified the ALJ's initial decision. In the meantime, the County and WM reached a settlement agreement in which the County agreed to pay WM $8,000,000 in settlement of its claims for tonnage shortfall and for increased costs due to Pennsylvania surcharge claims, together with interest. The timing and method of payment were left open.

On November 13, 1992, the DEPE[2] granted WM's and SWTR's motions for reconsideration of the Board's August 8, 1991, modification of the ALJ's initial decision. The DEPE concluded that the settlement reached between the County and WM had to be submitted to the DEPE for review and approval. It acknowledged that it would reconsider the Board's August 8, 1991, order rescinding the ALJ's allowance of the CPI-escalator clause and such other issues that had been raised by the parties before the Board.

III

On August 23, 1994, the Commissioner of the DEPE issued the final decision on reconsideration. The DEPE differed with the Board and found that the July 1, 1987, operating

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[2] By this point, the DEPE had succeeded to the solid waste regulatory functions formally vested in the Board.

contract with WM and SWTR had indeed been the result of arm's-length, competitive negotiations but concluded that such finding did not detract in any way from its regulatory jurisdiction to modify the contracts so as to eliminate the CPI clauses. The DEPE affirmed the Board's rejection of the automatic CPI-based rate escalator for the key reason that the major components of transfer station costs bore no relationship to the components of the CPI. It stated:

> Only when an automatic adjustment clause has been specially selected to reflect the type of costs under review, has its use been permitted. . . . [T]he CPI clauses here: (1) were not tailored in any way to reflect transfer station costs and (2) were not subject to any further ratemaking review or analysis.

The DEPE rejected the $8,000,000 settlement between the County and WM and, instead, granted to WM $4,841,930 in shortfall tonnage adjustments over the length of its contract and $1,065,746 in landfill taxes, although it rejected WM's claim of pre-judgment interest on those amounts. The DEPE also rejected SWTR's claim for additional payments arising from landfill tax surcharges and tonnage shortfall because SWTR's contract with the County failed to contain a specific guaranty that was relevant to the issue. The DEPE reasoned:

> [T]he SWTR and WM contracts treated this issue differently. Whereas the WM contract obligated the County to direct a minimum tonnage to the facility ("Guaranteed Tonnage") the SWTR contract merely set different rates which varied upon the average daily tonnage and were subject to correction in two six-month increments.

Both WM and SWTR appeal the DEPE's August 23, 1994, final decision which modified the Board's August 8, 1991 order. WM's Law Division action to enforce the $8,000,000 settlement with the County brought prior to the DEPE's final decision was transferred to this court and has been subsumed within the issues on these appeals.

IV

[1] In our consideration of the merits of these appeals, we recognize that appellate courts have a limited and structured role in reviewing the decisions of administrative agencies. We will not reverse an agency decision unless it is "arbitrary, capricious, or unreasonable or is not supported by substantial credible evidence in the record as a whole." *Dennery v. Bd. of Educ.*, 131 *N.J.* 626, 641, 622 *A.*2d 858 (1993). If we find sufficient credible, competent evidence in the record to support the agency's conclusion, we are bound to uphold the agency's findings. *See Goodman v. London Metals Exch., Inc.*, 86 *N.J.* 19, 28-29, 429 *A.*2d 341 (1981). Moreover, decisions of administrative agencies such as the DEPE carry with them a "strong presumption of reasonableness[.]" *See Newark v. Natural Resource Council in the Dep't of Envtl. Protection*, 82 *N.J.* 530, 539, 414 *A.*2d 1304 (1980), *cert. denied*, 449 *U.S.* 983, 101 *S.Ct.* 400, 66 *L.Ed.*2d 245 (1980). Where expertise of the administrative agency is a pertinent factor, we must accord the agency due regard in that respect. *Close v. Kordulak Bros.*, 44 *N.J.* 589, 599, 210 *A.*2d 753 (1965); *In re Boardwalk Regency Corp.*, 180 *N.J.Super.* 324, 333-35, 434 *A.*2d 1111 (App.Div.1981). We may not vacate an agency's determination merely because of doubts as to its wisdom or because the record may support more than one result. *See generally Henry v. Rahway State Prison*, 81 *N.J.* 571, 579-80, 410 *A.*2d 686 (1980). Consequently, "it is not our function to substitute our independent judgment for that of an administrative body, . . . where there may exist a mere difference of opinion concerning the evidential persuasiveness of the relevant proofs. As a reviewing court, we will not weigh the evidence, determine the credibility of witnesses, draw inferences and conclusions from the evidence, or resolve conflicts therein." *De Vitis v. New Jersey Racing Comm'n*, 202 *N.J.Super.* 484, 489-90, 495 *A.*2d 457 (citations omitted), *certif. denied*, 102 *N.J.* 337, 508 *A.*2d 213 (1985).

V.

Both WM and SWTR, each as the owner and operator of a solid waste transfer station, fall squarely within the definition of a public utility. N.J.S.A. 48:2-18 provides in pertinent part:

> The term "public utility" shall include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any . . . solid waste collection, solid waste disposal . . . system, plant or equipment for public use[ ]. . . .

N.J.S.A. 13:1E-27 then provided:[3]

> Any solid waste facility constructed, acquired or operated pursuant to the provisions of this amendatory and supplementary act shall be deemed a public utility and shall be subject to such rules and regulations as may be adopted by the Board of Public Utility Commissioners in accordance with the provisions of the "Solid Waste Utility Control Act of 1970" (P.L.1970, c. 40, C. 48:13A-1 et seq.).

WM's application to the Board for a factual hearing on whether it was to be regarded and treated as a public utility was properly rejected. Its status as a public utility was clear as a matter of law.

As public utilities, appellants were therefore subject to the "most sweeping" and "widest" range of regulatory power. *Township of Deptford v. Woodbury Ter. Sewerage Corp.*, 54 *N.J.* 418, 423-24, 255 *A.*2d 737 (1969) (citing *In re Public Service Electric and Gas Co.*, 35 *N.J.* 358, 371, 173 *A.*2d 233 (1961)). The sovereign power of the State over public

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[3] This provision was amended in 1991, which amendments are not relevant to the issues at bar.

utility rate contracts is well stated at 73B *C.J.S. Public Utilities* § 17, at 164 (1983), as follows:

> Every contract with respect to utility rates is conclusively deemed to be made with knowledge and in contemplation of the sovereign power of the state to alter it, and hence no objection can be raised that the state regulation impairs the obligation of contract . . . or deprives the contracting parties of property without due process of law[ ]. . . .

The Board properly exercised its continuing jurisdiction over the WM and SWTR contracts starting with its initial order of July 31, 1987, granting sub-certificates of Public Convenience and Necessity to each entity.

It is argued that since WM's and SWTR's July 1, 1987, contracts with the County were awarded as the result of competitive negotiations under the emergency bidding exception contained in *N.J.S.A.* 40A:11-6 rather than as the result of an award to the lowest responsible bidder following open and competitive public bidding that regulatory review and modification is precluded and the contracts must be accepted as written. WM and SWTR rely upon the particular wording of *N.J.S.A.* 40A:11-6(b) which provides that upon furnishing services in accordance with a contract awarded under the emergency bidding exception, "the contractor furnishing such . . . services shall be entitled to be paid therefor and the contracting unit shall be obligated for said payment."

[2] We do not view the LPCL as evincing a legislative intent to restrict, modify, or limit public utility contracts from regulatory oversight and from the review and modification authority of the Board. The Board's legislative charge is to protect the interests of the rate paying public whether the contract setting forth the tariff rates was awarded following open and competitive public bidding or awarded as the result of negotiations in an emergent setting. It defies logic to perceive that the Legislature would seek to protect the public by vesting the Board with jurisdiction to review utility contracts that are the product of public bidding but leave the public

unprotected and deprive the Board of its oversight authority with respect to utility contracts that are negotiated and awarded under emergent circumstances. The Supreme Court in *Application of Borough of Saddle River*, 71 *N.J.* 14, 362 *A.*2d 552 (1976), while recognizing that public bidding is the preferred route to be taken for the award of municipal solid waste contracts, held that contracts awarded without competitive public bidding do not narrow the Board's scope of review or exempt such contracts from regulatory oversight. Particularly, it ruled:

> Such contracts, although their provisions are agreed upon by the parties, are nevertheless subject to modification by the Board of Public Utility Commissioners in the public interest.
>
> [*Id.* at 23, 362 A.2d 552 (citations omitted).]

Additionally, this court must discern the meaning of a statute from the plain language contained therein. *Kimmelman v. Henkels & McCoy, Inc.*, 108 *N.J.* 123, 128, 527 *A.*2d 1368 (1987). The plain language of *N.J.S.A.* 40A:11-6(b) entitles the service provider to be paid and for the contracting unit to "take such action as shall be required to provide for the payment of the contract price." Therefore, the rate-setting of such payment remains subject to regulatory oversight for rate-review pursuant to *N.J.S.A.* 48:13A-7(a) and (b).

Moreover, both contracts contained language which required them to be construed in accordance with and be governed by the laws of this State and we are satisfied that both contracts were entered into subject to the acceptance and approval of the Board. A specific clause to that latter effect is contained in the SWTR contract.

Accordingly, both WM and SWTR knew or should have known from the outset in 1987 that they were public utilities and would function and be treated as such.

[3] It is patently clear that the Board, and also the DEPE when it succeeded to the regulatory powers of the Board, had the authority to eliminate the applicability of the CPI-based

automatic escalator clause of each contract. Each contract was subject to modification in the exercise of the overriding authority of the Board to act in the public interest. *Saddle River*, *supra*, 71 *N.J.* at 23, 362 *A.*2d 552. The exercise of such authority was not arbitrary, capricious or unreasonable and did not result in retroactive rule making. Likewise the Board's adoption of what appellants characterize as a "nexus" standard was not arbitrary, capricious, or unreasonable.

N.J.S.A. 48:13A-7(b) specifically confers jurisdiction on the Board to adjust rates or charges contained in solid waste disposal contracts in order that the rates result in "just and reasonable rates or charges." As we have decided, such jurisdiction inheres even though the contracts of WM and SWTR were found to be the end product of openly-arrived-at competitive negotiations. The acceptance of the contracts by the Board in its original order of July 31, 1987, was on an "interim, initial and emergent" basis. In its order of January 4, 1989, the Board emphasized that until such time as the claims made pursuant to the CPI escalation clauses were found to be reasonable, the rates being charged the County could not be increased.

In her initial ruling, the ALJ held that the contracts between the County and WM and SWTR were negotiated at arm's length in a competitive market and therefore the CPI clauses were enforceable. However, the Board, while concluding that the contracts were not the result of arm's-length negotiations in a competitive market, found that the CPI-based automatic increases were unrealistic because the cost components of the CPI are unrelated to the cost components of a transfer station and the costs of landfill disposal. The Board reviewed the record presented by appellants and concluded that the record did not demonstrate a "nexus" between the factors contributing to anticipated increases in transfer stations costs and the factors upon which the CPI is based. In so determining, the Board did not create a wholly new "nexus" standard for its rate making review. It simply used a descriptive word and just as well could have used another synonym for "nexus" to characterize its ruling. The main responsibility of the Board was

to determine whether the rates charged the County by WM and SWTR were just and reasonable. In its view, "nexus" meant that WM and SWTR, as public utilities seeking a rate increase, had the burden of proving every aspect of a rate's reasonableness. A meaningful "nexus" or connection must exist between the underlying cost factors (food, household goods, and electronic equipment) built into the CPI and the underlying cost factors (labor, transportation, depreciation, landfill, and disposal costs) built into transfer station operation, which are the components upon which the rate structure depends, so that the resultant rate after applying the CPI factor can be deemed just and reasonable. In this case, the Board, as well as the DEPE, concluded that applying an unrelated multiple, created by the CPI, to the existing rates charged the County would make the rates unreasonable.

[4] Accordingly, the use of the term "nexus" was not a new standard but merely another way of defining the burden, incumbent upon the public utilities in seeking an increase in the rate structure, to prove that rates are just and reasonable.

[5] The conclusion by the Board as well as the conclusion by the DEPE that the CPI-based automatic increases were not enforceable did not constitute retroactive rule making. The CPI clauses had never been finally accepted by the Board as the Board pointed out in its January 4, 1989, clarification order. The approved rates were interim only. The Board retained the right to modify solid waste disposal contract rates, including the application of the CPI-rate escalator clause, without exception. N.J.S.A. 48:13A-7 then provided:[4]

> a. The board, upon complaint or its own initiative, after hearing, may direct any person engaging in the . . . waste disposal business to furnish proof that the charges . . . received for such service do not exceed just and reasonable rates or charges for such service.

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[4] This statute was later amended, which amendment does not affect this matter.

> b. (1) Should the board find that the rates or charges are excessive then it may order the person charging such excessive rates or charges to make an adjustment in the contract to a sum which shall result in just and reasonable rates or charges.

In Matter of Redi-Flo Corp., 76 *N.J.* 21, 38, 384 *A.*2d 1086 (1978), the Court said "there is no doubt that the Board has the *power* to suspend any proposed rate increase" based upon an automatic fuel adjustment escalator clause until such time as it is established that the resulting rate is "just and reasonable."

In recapitulation, judicial review of the reasonableness of applying automatic CPI-based increases to the basic rates charged the County is foreclosed by the standards of our appellate function. We have no warrant to interfere with the regulatory expertise of the administrative agency. Reliance by WM and SWTR on other instances where CPI-based automatic escalators have been allowed is not persuasive in this matter. Each case must rest upon its own peculiar facts.

The Board was not bound to accept the CPI-based automatic rate increase whether or not the clause was contained in a contract negotiated at arm's length in a competitive market by both WM and SWTR with the County. While the County agreed that its taxpaying community would bear the added costs of CPI- based rate increases applied at the rate of 106% to the existing rate structure of each contract, it could not abrogate the Board's statutory responsibility to review and modify public utility contracts to insure a just and reasonable rate or charge. *N.J.S.A.* 48:13A-7. In this regard, neither the Board nor the DEPE abused their discretion or acted in an arbitrary, capricious, or unreasonable manner.

VI

On November 13, 1992, in granting WM's motion for reconsideration, the DEPE had opted to review the propriety of the $8,000,000 settlement agreement arrived at by WM with the County, concluding that a settlement agreement seeking to

adjust payments for solid waste utility services like any other contract for utility service is subject to its regulatory jurisdiction. *See Saddle River, supra*, 71 *N.J.* at 23, 362 *A.*2d 552. *See also New Jersey Suburban Water Co. v. Riordan*, 4 *N.J. Misc.* 256, 259, 132 *A.* 318 (Sup.Ct.), *aff'd*, 103 *N.J.L.* 498, 135 *A.* 919 (Err. & App.1926).

WM did not then object to consideration of the settlement agreement by the DEPE and does not now object to the total of $5,907,676 awarded to it by the DEPE for tonnage shortfall adjustments and for landfill taxes paid by it. Our review of the DEPE's August 24, 1994, final decision amply indicates that the reasonableness of the settlement was considered; evidenced by the award to WM of $5,907,676. In practical effect, the settlement agreement was accepted as to that amount and rejected as to the balance.

[6] The DEPE, in the exercise of discretion vested in the Commissioner, refused to allow what is tantamount to prejudgment interest on the award to WM. We see no error in this discretionary determination, *Bak-A-Lum Corp. of Am. v. Alcoa Building Prods., Inc.*, 69 *N.J.* 123, 131, 351 *A.*2d 349 (1976); *Busik v. Levine*, 63 *N.J.* 351, 356-57, 307 *A.*2d 571 (1973), especially where, in the absence of an overriding equity, a governmental agency would be called upon to pay the interest. *Division of Youth and Family Services v. County of Middlesex*, 188 *N.J.Super.* 1, 5, 455 *A.*2d 1119 (App.Div. 1982). Moreover, the denial of interest was not "a manifest denial of justice." *Coastal Group, Inc. v. Dryvit Sys., Inc.*, 274 *N.J.Super.* 171, 181, 643 *A.*2d 649 (App.Div.1994).

[7] Contrary to their contentions, WM and SWTR were not entitled to be treated just "like any other contract vendor" in a free, open, and competitive market. They were public utilities acting in an industry (solid waste) which the Legislature had found to be "a matter of grave concern to all citizens . . . and thoroughly affected with the public interest[.]" *N.J.S.A.* 13:1E-2(a). As participants in a regulated industry, WM and SWTR were entitled to a fair rate of return based upon their capital invested and upon risks undertaken. *State Farm Mut.*

Auto. Ins. Co. v. State, 124 *N.J.* 32, 48, 590 *A.*2d 191 (1991). Neither WM nor SWTR urge that their financial health has been jeopardized by the Board's action or by the action of the DEPE in rejecting the CPI-based automatic increases. While an ordinary "contract vendor" may seek to maximize profits, that goal does not characterize the economics of a regulated industry. *See, e.g., Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 282 *N.J.Super.* 140, 196, 659 *A.*2d 904 (App.Div.), *certif. denied*, 141 *N.J.* 99, 660 *A.*2d 1197 (1995).

VII

The City of Newark has cross-appealed against SWTR arguing that it was error for the DEPE to find that SWTR's transfer station contract was the product of an arm's-length negotiation in a competitive market. Newark seeks a remand whereby SWTR will be obliged to prove the reasonableness of its rates.

[8] In its final decision on reconsideration rendered August 23, 1994, the DEPE had before it the detailed factual findings made by the ALJ in arriving at her initial decision that both WM's and SWTR's contract were arrived at in a competitive market as a result of arm's-length negotiations. The DEPE reached the same conclusion. The record is replete with evidence that the County mailed approximately 100 solicitations to prospective operators, that nine responses were received, that the County found the proposals submitted by WM and SWTR and transfer station sites proposed to be worthy of consideration and that extensive negotiations took place before the contracts were finalized even though the atmosphere was somewhat heated because of the restricted timeframe facing the County. Accordingly, we do not disturb the conclusion of the DEPE. It was not arbitrary, capricious, or unreasonable and it is supported by substantial credible evidence in the record.

Similarly, we find no merit in Newark's contention that the DEPE's decision not to address SWTR's initial contract rate base/rate of return standard was an error. The Board and the DEPE did consider the overall reasonableness of the rates

charged by WM and SWTR and concluded that absent the CPI-based automatic escalator clause, WM and SWTR had met their burden of proving the reasonableness of the basic initial rate structure.

VIII

In conclusion, we are satisfied that the Board and the DEPE diligently and thoroughly explored the negotiations and effect of the July 1, 1987, contracts of both WM and SWTR; the reasonableness of the rates charged the County; the impropriety of automatically increasing rates according to the CPI; the efficacy of not giving WM the full benefit of an $8,000,000 settlement agreement with the County, but rather awarding to WM $4,841,930 in shortfall tonnage adjustments and $1,065,746 in landfill taxes in lieu of the gross settlement amount; and, finally, within their discretion, the denial of interest on the amounts awarded.

Affirmed.

Appendix C

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COMMISSIONERS OFFICE

IN THE MATTER OF THE PETITION OF THE COUNTY OF ESSEX FOR A FRANCHISE AND APPROVAL OF CONTRACTS WITH SOLID WASTE TRANSFER AND RECYCLING INC., AND WASTE MANAGEMENT OF NEW JERSEY, INC., AND THE CO-APPLICATION OF ESSEX COUNTY AND SOLID WASTE TRANSFER AND RECYLING, INC. FOR CERTIFICATION OF PUBLIC CONVENIENCE AND NECESSITY AND FOR OTHER SUPPLEMENTAL RELIEF.	ORDER ON RECONSIDERATION
IN THE MATTER OF THE COUNTY OF	AGENCY DKT. NO. SE87070552 SE87070566
CONTINUATION OF INTERIM SOLID WASTE DISPOSAL RATES AND (2) FOR APPROVAL OF (2) FOR APPROVAL OF CUBIC YARD CONVERSION RATIO OF 3:1	OAL DKT. NO. PUC03173-88

(SERVICE LIST ATTACHED)

BY THE COMMISSIONER:

This matter is before the Department of Environmental Protection on reconsideration of an Order issued August 8,

1991 by the Board of Public Utilities ("BPU" or "Board"). That Order was the culmination of a certification and rate proceeding initiated by the County of Essex ("County") in July of 1987. On July 16, 1987, the County petitioned the Board for a Certificate of Public Convenience and Necessity ("Certificate") for two solid waste transfer stations and for approval of construction and operating contracts between the County and each of its two contract vendors: Waste Management of New Jersey, Inc. ("WM") and Solid Waste Transfer and Recycling, Inc. ("SWTR"). On July 20, 1987, the County also filed a schedule of proposed rates. Expedited interim approval of its application was requested by the County in light of the need to have the transfer stations in operation by July 31, 1987.[1] The active parties in this proceeding have been Essex County, WM, SWTR, the former Department of the Public Advocate, Division of Rate Counsel, and the City of Newark.

After lengthy hearings at the Office of Administrative Law (OAL), Administrative Law Judge (ALJ) Diana Sukovich issued a 136-page Initial Decision, dated December 26, 1990, in which she recommended that the contracts in question and the rates contained therein be adopted by the Board as reasonable. On August 8, 1991, the BPU issued its final order modifying the ALJ's determination. Briefly summarized, the BPU held that (1) the transfer station contracts had not been awarded in a normal competitive environment due to the emergent nature of the County's solid waste needs and the limited number of qualified potential transfer station operators; (2) automatic rate escalator clauses contained in the contracts, which tied rate increases to increases in the Consumer Price Index (CPI), were unreasonable in that the components of the CPI had not been shown to be reflective of changes in costs typically

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[1] The County was subject to a court imposed deadline to cease disposing of county waste at a landfill operated by the Hackensack Meadowlands District Commission (HMDC).

associated with operation of solid waste transfer stations;[2] and (3) no increase in rates above interim levels previously approved by the Board was warranted, and therefore, interim rates should be made final.

Following issuance of the Board's final order, both WM and SWTR filed motions for reconsideration. During the pendency of these motions, the Department succeeded to the duties and responsibilities of the Board in the area of solid waste regulation.

On November 13, 1992 the Department granted WM's and SWTR's motions for reconsideration. Subsequently, voluminous briefs were filed by the parties, numerous status conferences conducted, and oral arguments presented on a number of issues. The principle issues addressed by the parties were: (1) the competitive nature of the negotiations preceding the award of the contracts in question, (2) the reasonableness of automatic CPI-linked rate increases; and (3) WM and SWTR's entitlement to shortfall tonnage adjustments and Pennsylvania landfill taxes.

In addition to the above rate issues, the reasonableness of a proposed settlement between the County and WM is also at issue. The County and WM have indicated that an agreement has been reached for the payment of 8 million dollars by the County in settlement of all claims arising under the BPU's order. The County has further indicated, however, that, although it has already paid $500,000 towards the settlement amount, payment of the balance is contingent upon this Department's approval of the settlement agreement. Conversely, WM has challenged the Department's jurisdiction to review the settlement, arguing that the settlement has no impact upon ratepayers since the WM facility has ceased operations.

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[2] Although the BPU approved interim rates, it did not permit implementation of CPI increases during the pendency of the rate case.

I will first address the substantive rate case issues before discussing the proposed settlement. The position of each party is summarized as follows:

POSITION OF WM

(1) *Competitive Nature of Contract With Essex County*

WM claims that the BPU erred in finding that its contract with the County was not the result of arm's length negotiations in a competitive market. WM argues that the competitiveness of the procurement process is evidenced by: (1) the fact that the resulting rates were the lowest in the State; (2) that Essex County was immunized from possible future increases in transportation and environmental costs in excess of CPI; and (3) that the County vigorously negotiated the terms of the contract. WM also argues that the ALJ did not rely solely on a competitive market test in reaching her conclusion, but also conducted a cost-based analysis of the contract rates, further assuring reasonableness.

(2) *CPI Adjustments*

WM argues that the BPU's demand for a "nexus" between anticipated changes in transfer station operating costs and the CPI is a new standard of review, articulated for the first time in the Board's final order. WM contends that failure to advise the parties beforehand of this standard violates fundamental principles of due process. Similarly, strong objections are raised with respect to the BPU's reliance on previous decisions in which automatic escalator clauses have been rejected. With respect to the substantive merits of the CPI, WM states that the record before the ALJ demonstrates that (1) the contract rates under review are lower than rates at comparable transfer stations and therefore reasonable by comparison and (2) that actual costs over the last two years of the contract increased faster than the CPI.

(3) *Retroactive Abrogation of a Contractual Obligation*

WM argues that after it bore all risks of increased costs above CPI adjustments and after it commenced the rendering of service, the Board's order abrogated its contract rights and thus "confiscated" its property without due process. In this regard, WM contends that its contract was approved by the Board in an order dated July 31, 1987. The Board's subsequent rejection of that contract in August 1991, WM argues, violates due process requirements and sets poor public policy. The fact that a contract can be retroactively voided after substantial investment has been made and services rendered will, in WM's view, deter future participation by private industry in New Jersey's solid waste market.

(4) *Entitlement to Pennsylvania surcharges and tonnage shortfall adjustments*

WM contends that even if the BPU's Order is affirmed by the Department, that Order rejected only the CPI clause contained in the Essex County contract. All other provisions therein, such as WM's right to be reimbursed for Pennsylvania landfill taxes and tonnage ratefall adjustments, remain intact.

POSITION OF SWTR

The arguments presented by SWTR are virtually identical with respect to the above rate issues as those presented by WM. In the interest of brevity, therefore, those arguments will not be repeated here. To the extent there are minor deviations, they are addressed elsewhere in this order.

POSITION OF ESSEX COUNTY

The County argues in support of the reasonableness of the Board's August 31, 1991 final Order. At the same time, however, the County also supports the reasonableness of the proposed settlement between itself and WM. The County notes that its potential liability to WM on CPI, Pennsylvania surcharges and shortfall tonnage adjustments (without interest) totals $9,361,174. With the application of interest, that

liability, according to the County, could exceed $15,000,000. When viewed in this context the County argues that the $8,000,000 settlement amount is reasonable.

Prior to its proposed settlement agreement with WM, the County's position on the substantive issues in this case had been briefed extensively. On the main issues, the County contends that: (1) the contracts with both WM and SWTR were not negotiated in a competitive environment due to the emergent nature of the county's needs; (2) the CPI clauses are not reflective of changes in solid waste transfer station costs; (3) both WM and SWTR failed in their burden of demonstrating that the contract rates are reasonable under a rate base/rate of return analysis; and (4) the Board had an obligation to set reasonable rates independent of the negotiated contracts.

POSITION OF DEPARTMENT STAFF

Staff supports the BPU's August 31, 1991 Order. In the proceeding at the OAL, Staff took exceptions to the findings of the presiding ALJ and challenged the competitive nature of the procurement process, as well as the reasonableness of the CPI adjustment clauses. Staff further argued that neither WM nor SWTR had presented an adequate cost-based analysis upon which to base utility rates and that such failure hindered Staff in its own efforts to develop an alternative rate. Staff has taken no express position concerning the Settlement.

POSITION OF RATE COUNSEL

Initially, it should be noted that Rate Counsel's participation in the proceeding on reconsideration has been challenged by SWTR in view of Rate Counsel's failure to file exceptions to the ALJ's Initial Decision. Notwithstanding such objections, however, Rate Counsel has been permitted to present both written and oral arguments on reconsideration. I find SWTR's objections to be without merit. No case law has been presented supporting the theory that exceptions are a prerequisite to further participation. Moreover, Rate Counsel's

special status as the public representative in matters of this sort should not be lightly circumscribed.

With respect to Rate Counsel's substantive arguments, Rate Counsel urges the Department to affirm the Order of the BPU and reject the Essex County contracts. Rate Counsel argues against the position taken by WM and SWTR to the effect that the Board's Order merely rejected the CPI clauses and left other provisions of the contracts (specifically those relating to Pennsylvania taxes and shortfall tonnage adjustments) intact. Rate Counsel reasons that the contracts were found by the Board to have been negotiated in a competitive environment and therefore all provisions contained therein should be deemed rejected.

On the issue of the Board's initial implementation of the contracts, Rate Counsel argues that the July 31, 1987 Order relied upon by WM and SWTR as "final" was no more than interim in nature and clearly clearly subject to future modifications. Rate Counsel also contests the reasonableness of the CPI-linked escalator clauses and asks the Department to affirm the Board's rejection of automatic rate increases. Rate Counsel opposes the proposed settlement between WM and the County inasmuch as WM has no meritorious claim to further recovery with or without interest charges.

POSITION OF CITY OF NEWARK

The City of Newark argues in favor of the Board's Order rejecting the WM and SWTR contracts. Newark sets forth considerable case law upholding the State's right to review and modify utility contracts. Similarly, Newark exhaustively cites to numerous administrative decisions in which automatic adjustment clauses have been rejected. Newark also stresses the interim nature of the Board's July 31, 1987 Order approving the county's contracts with WM and SWTR. With respect to the competitive nature of the procurement process, Newark notes the unequal bargaining status of the parties in view of the time constraints on the County. Newark further views the record created before the OAL as inadequate to

establish a rate base/rate of return justification for the contract rates.

Newark opposes approval of any settlement between WM and Essex County absent a prior exploration of the ultimate finding mechanism and its impact upon the residents of Newark.

FINDINGS ON RATE CASE ISSUES:

I am cognizant of the thorough presentation of the issues on reconsideration made by the parties herein. Numerous briefs, letter memoranda and oral presentations give ample assurance that every party has had a more than adequate opportunity to present its case. I am also cognizant of the care with which the former Board examined the voluminous record in this matter and reached its conclusions an reflected in its August 8, 1991 Order. For the most part, my reconsideration of this matter reflects concerns identical to those expressed by the Board, most notably with respect to the CPI issue. In other areas, however, I have been persuaded on reconsideration to make certain adjustments to the Board's decision, primarily with respect to the status of the County contracts. Each area of agreement or modification is dealt with separately below.

(1) *CPI Based Automatic Increases:*

I am in complete agreement with the Board's rejection of the CPI-based automatic increases sought by WM and SWTR. There are fundamental problems with automatically linking rate increases at solid waste transfer stations to the CPI. The major components of transfer station costs are depreciation, landfill disposal hosts, transportation costs, return on investment and salaries. The major components of the CPI relate to food, housing and electronic goods and thus bear little relationship to increases in costs associated with the solid waste industry.

Well-established regulatory policies and law provides that rate increases would not be based upon CPI escalators. Reflecting this policy, New Jersey's ratemakers have consistently refused to recognize increases associated with general

inflationary factors." See *Petition of Elizabethtown Water Company*, 11 *A.J.A.R.* 303, 337 (OAL 2994), reversed on other grounds, 205 *N.J. Super.* 528 (App. Div. 1985). affirmed as modified, 107 *N.J.* 440 (1987). See *Re Jersey Central Power & Light Co.*, 65 *PUR* 45th 175 (*N.J.* B.P.Y. 1985); *Re Commonwealth Water Company*, 21 *PUR* 4th 254, 273-274 (S.D.P.U.C. 1977) (The effects of inflation on a company do not in any reasonably accurate manner parallel those contained in the CPI.) in *Elizabethtown Water Co.*, *supra*, the Board rejected a general 4% inflationary increase in the calculation of expenses. In *Jersey Central Power and Light Co.*, *supra*, the Board rejected a proposed use of the CPI in a utility's calculation of future costs of decommissioning a nuclear generating station, stating that the CPI did not accurately reflect the true cost of decommissioning because it did not truly quantify petitioner's projected labor costs." 65 *PUR* 4th at 178.

Only when an automatic adjustment clause has been specially selected to reflect the type costs under review, has its use been permitted. In *Application of SES Gloucester Company*, the Board approved a 20-year utility rate formula for a resource recovery facility that included a formula for annual adjustments based upon changes in the Producer Price Index (PPI). The use of this clause, however, was specifically linked to further Board review of each increase. In contrast, the CPI clauses here (1) were not tailored in any way to reflect transfer station costs and (2) were not subject to any further ratemaking review or analysis.[3]

Equally well-established is the fact that the burden of proving every aspect of a rate's reasonableness is upon the utility. See *Public Service Coordinated Transport of New Jersey v. State* 5, *N.J.* 196, 219 (1950); *In re Application of*

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[3] New Jersey is not alone in this guarded approach to automatic rate adjustments. Other jurisdictions have similarly rejected automatic CPI adjustment clauses or similar inflationary adjustments. *See i.e.*, *Re Otter Tail Power Co.*, 21 *P.U.R.* 114th 254 (S.D. P.U.C. 1977).

Saddle River, 71 *N.J.* 14, 25-26 (1976). Consequently, requiring a solid waste utility to demonstrate a "nexus" between transfer station cost components and the CPI is far from the articulation of a "new" standard, as argued by WM and SWTR. Rather, such a requirement does no more than hold WM and SWTR to their burden of proving the reasonableness of their proposed rate. I therefore reject arguments raised by WM and SWTR to the effect that the Board's reliance upon previous cases relating to automatic adjustment clauses was somehow unexpected and a denial of due process. Accordingly, because WM and SWTR have failed to create a record supporting the reasonableness of automatic CPI-based rate increases, I *AFFIRM* the Board's rejection of these increases.

I similarly reject arguments by WM and SWTR to the effect that denial of CPI increases after services have been rendered constitutes a violation of due process. Those who do business in a regulated environment are deemed to know that their agreements are subject to the overriding supervision of the regulatory authority.

Courts have long recognized that parties operating in regulatory environments are aware that the agreements they reach are subject to the overriding jurisdiction of the regulating agency. Thus,

> Every contract with respect to utility rates is conclusively deemed to be made with knowledge and in contemplation of the sovereign power of the state to alter it, and hence no objection can be raised that state regulation impairs the obligation of contract or deprives the contracting parties of property without due process of law . . . [73B *C.J.S.* "Public Utilities" at 164]

This longstanding principle was acknowledged in *New Jersey Suburban Water Co. v. Riordan*, 4 *N.J. Misc.* 256 (Sup. Ct.) aff'd 103 *N.J.L.* 498 (E & A 1926), where the Court stated:

> Since the adoption of the Public Utilities Act of 1911, a contract between a municipality and a water company, fixing the rate to be charged for service, imposes no restrictions on the sovereign power of the State to fix just and reasonable rates as subsequent conditions may make desirable, and when the state, through its Board of Public Utility Commissioners, exercises its sovereign power over rates, the contract rights of the parties must yield (4 *N.J.* Misc. at 259]

With specific reference to publicly bid municipal contract for solid waste utility services, our Supreme Court in *In Re Saddle River*, 71 *N.J.* 14 (1976), ruled that:

> Such contracts, although their provisions are agreed upon by the parties, are nevertheless subject to modification by the Board of Public Utility Commissioners in the public interest. [71 *N.J.* at 23]

Indeed, this agency is vested with broad authority over all aspects of solid waste collection and disposal under *N.J.S.A.* 48:13A-1 *et seq*. The Legislature has declared that the disposal of solid waste "is a matter of grave concern to all citizens and . . . thoroughly affected with the public interest." *N.J.S.A.* 48:13A-2. Having succeeded to all powers vested in the former BPU, the Department is statutorily charged with "the duty of setting and enforcing solid waste disposal standards and rates for regulating the 'economic aspects' of all solid waste disposal services." *N.J.S.A.* 48:13A-2. Upon complaint or on its own initiative the Department may direct "any person engaging in the solid waste disposal business to furnish proof that the rates or charges received for solid waste disposal services do not exceed just and reasonable rates or charges for such service." *N.J.S.A.* 48:13A-7(a). In the event rates or charges are excessive, the Department may order "an adjustment in the tariff or contract to a sum which shall result in just and reasonable rates or charges." *N.J..S.A.* 48:13A-7(b). The parties to the contracts at issue here knew fully that their interaction was subject to such regulatory jurisdiction.

I also find no merit in the reliance placed by WM and SWTR upon the Board's July 31, 1987 initial order implementing the service contracts. The Board's implementation of these service contracts was emergent, interim in nature, and clearly subject to future modifications at the close of the rate proceeding. If this were not the case, it is difficult to ascertain what purpose further rate proceedings would have served.

(2) *Status of Contracts*

In her initial Decision, the presiding ALJ specifically found that the County's contracts were the result of an arms' length competitive procurement process. In its August 8, 1991 Order, the Board reversed this finding, reasoning that the emergent solid waste needs of the County and, in the Board's view, the limited number of available vendors, rendered the negotiation process less than competitive. For such reason, the Board rejected the contracts and proceeded to set independent service rates.[4]

The degree to which the Court-imposed deadline may or may not have influenced County's negotiation strategy is an issue over which reasonable persons may legitimately differ. Similarly, the intensity of the County's negotiation efforts and the adequacy of the pool of potential vendors (both in terms of qualifications, numbers and interest) can also be the subject of reasonable but differing views. In the present case, I am persuaded by the analysis of the presiding ALJ with respect to the competitive nature of the procurement process and the efforts the County made to secure the best deal possible. As the

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[4] SM and SWTR have argued that the Board's order did not reject the contracts in their entirety, but simply rejected the CPI clauses contained therein. In support of this proposition, reliance is placed upon language in the Board's order which refers to revision of the "contract" rate. As I read the order, it is clear that the Board rejected the contract in its entirety based upon its belief that the negotiation process was not sufficiently competitive. The reference to revision of the "contract" rate appears to refer merely to the starting point for the Board's independent rate computation.

presiding ALJ, it was she who had the opportunity to hear the witnesses describe the negotiation process, the rating system the County used in evaluating candidates, and the overall tenor of meetings and discussions. I find no fault with her conclusion, therefore, that based upon the record presented to her there existed no reason to believe that the negotiation process was less than competitive.

For such reason, based upon the record developed before the ALJ, I *FIND* that the contracts in question were the result of competitive negotiations. Such finding does not detract in any way, however, from this Department's jurisdiction to modify said contracts so as to eliminate the CPI clauses as sat forth above. As previously stated, utility contracts are deemed entered into with full knowledge of the overriding jurisdiction of the regulating authority.

(3) *Tonnage Adjustments and Pennsylvania Landfill Taxes*

Having found the contracts in question to be the result of arms-length competitive bidding and having modified such contracts only to the extent of eliminating automatic CPI adjustments, other contract provisions relating to the recovery of shortfall tonnage adjustments and landfill taxes remain intact. The record before me supports a finding that, with respect to WM, there exists $4,841,930 in shortfall tonnage adjustments over the life of the contract and $1,065,746 in landfill taxes. I *FIND* these amounts reasonable and approve recovery by WM. I reject, however, WM's claim of entitlement to interest on such amounts. WM cites no case law supporting the award of interest in a rate proceeding.

With respect to SWTR's alleged entitlement to shortfall tonnage adjustments, the SWTR and WM contracts treated this issue differently. Whereas the WM contract obligated the County to direct a tonnage to the facility ("Guaranteed Tonnage") the SWTR contract merely set different rates which varied upon the average daily tonnage and were subject to correction in two six-month increments. In addition, the adjustment was available only during the "interim emergency

service period" which spanned August 1, 1987 to August 1, 1988. Further, any claims for shortfall tonnage adjustment entitlement were to be made by SWTR two days from the end of both six-month periods within the interim emergency services period and remittance was to occur within the preceding six months. Essex County has stated unequivocally that no such claims were presented by SWTR in a timely manner and SWTR has been unable to provide invoices showing tonnage shortfalls. The County also objects to SWTR raising an alleged entitlement to recovery of these adjustments at this late date. (See September 10, 1993 and September 14, 1993 letters from Michael Caro, Esq. to former Commissioner Fox on behalf of the County). SWTR's claim to recovery of landfill taxes is similarly unspecified. Given the untimely and unsubstantiated nature of SWTR's claims, such claims are *DENIED*.

In conclusion, the August 8, 1991 Order of the former Board of Public Utilities in this matter is *HEREBY MODIFIED* upon reconsideration to the extent set forth above. In light of my decision, the proposed eight million dollar settlement between Essex County and WM is *REJECTED*.

/s/ Robert C. Shinn

Robert C. Shinn
Commissioner Department of
Environmental Protection
and Energy

DATED: AUG 23, 1994

Appendix D

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
Two Gateway Center
Newark, N.J. 07102

IN THE MATTER OF THE PETITION OF THE COUNTY OF ESSEX FOR A FRANCHISE AND APPROVAL OF CONTRACTS WITH SOLID WASTE TRANSFER AND RECYCLING, INC., AND WASTE MANAGEMENT OF NEW JERSEY, INC., AND THE CO-APPLICATION OF ESSEX COUNTY AND SOLID WASTE TRANSFER AND RECYCLING, INC., FOR CERTIFICATION OF PUBLIC CONVENIENCE AND NECESSITY AND FOR OTHER SUPPLEMENTAL	)	SOLID WASTE *ORDER MODIFYING INITIAL DECISION* DOCKET NOS. SE87070552 SE87060566
* * * * * * * * * *		
IN THE MATTER OF THE COUNTY OF ESSEX (1) FOR APPROVAL AND CONTINUATION OF INTERIM SOLID WASTE DISPOSAL RATES AND (2) FOR APPROVAL OF CUBIC YARD CONVERSION RATIO OF 3:1	)	OAL DOCKET NO. PUC3173-88

H. Curtis Meanor, County Counsel, Norman Schulaner, Assistant County Counsel, Frank Becz, Assistant County Counsel, Sheila Genovese, Assistant County Counsel, and Thomas Bachman, Assistant County Counsel, for the County of Essex, petitioner.

(H. Curtis Meanor, County Counsel attorney)

Joseph M. Cerra, Esq., Charles A. Reid III, Esq., and Antoinette Bennet, Esq. for Solid Waste Transfer and Recycling Inc., petitioner

(Shanley & Fisher, attorneys)

Theodore A. Schwartz, Esq. and Sandra T. Ayres, Esq., for Waste Management of New Jersey, Inc. respondent

(Schwartz, Tobia and Stanziale, attorneys)

Howard T. Rosen, Esq., Thomas A. Penn, Esq., Harvey C. Kaish, Esq., and Richard Epstein, Esq., for the City of Newark, intervenor

(Clapp & Eisenberg, P.C. attorneys)

Michael Critchley, Esq., for the City of Orange, intervenor

John M. Malyska, Esq., and Jane E. Solomon, Esq., for the Township of Glen Ridge, intervenor

(Meyner & Landis, attorneys)

Thomas McCormack, Esq., for the Township of Caldwell, intervenor

(McCormack & Petrolle, attorneys)

Mumtaz Bari-Brown, Deputy Public Advocate, Badrhn M. Ubishin, Assistant Deputy Public Advocate, Amy P.K. Motzenbecker, Assistant Deputy Public Advocate, Jacqueline Hardy, Assistant Deputy Public Advocate, Ellen B. Maughn, Assistant Deputy Public Advocate, Joseph Quirolo, Assistant Deputy Public Advocate, and Philip Bauknight, Assistant Deputy Public Advocate, for the Division of Rate Counsel, Department of the Public Advocate, intervenor

(Wilfredo Carabello, Public Advocate of New Jersey, attorney)

BY THE BOARD:

On July 16, 1987, the County of Essex (Essex, County or petitioner) filed an application with the Board of Public Utilities (Board) for a Certificate of Public Convenience and Necessity (Certificate) for solid waste transfer stations and for approval of contracts which Essex had entered into with two companies, Waste Management of New Jersey, Inc. (WMNJ or respondent) and Solid Waste Transfer and Recycling, Inc. (Solid Waste Transfer, SWTR or petitioner) to construct and operate such transfer stations. The County requested expedited interim approval of its application in light of its need to have a disposal system in place by July 31, 1987, the effective date of a redirection of Essex County waste away from the Hackensack Meadowlands Development Commission (HMDC) landfill.

Essex filed a schedule of proposed tariffs on July 20, 1987. The Board conducted a public hearing on the County's application for initial interim rates on July 28, 1987. By order dated July 31, 1987, the Board approved the County's proposed tariff rates as interim solid waste disposal rates; accepted the contracts between Essex and Solid Waste Transfer and Essex and WMNJ; [1] issued Certificates to Essex and to WMNJ for a transfer station (Avenue A or Transfer Station) located at 100 Avenue A and to Solid Waste Transfer for a transfer station (Avenue F or Transfer Station) located at 442-444 Frelinghysen Avenue, both of which are located in Newark, New Jersey. The emergent interim rates approved by the Board in its July 31, 1987 Order were $100.15 per ton for Type 10 and $107.85 per ton for Types 13, 23, 25 and 27 waste. By Order of October 27, 1987, the Board awarded a franchise to Essex for the disposal of solid waste within the County pursuant to the Solid Waste Utility Control Act of 1970, *N.J.S.A.* 48:13A-1 *et seq.*

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[1] By Order dated January 4, 1989, the Board clarified its acceptance of the contracts between Essex and Solid Waste Transfer and WMNJ as being interim in nature pending final decision in this matter.

On February 4, 1988, the County filed supplemental petition with the Board. Count 1 of the petition sought approval of the interim rates as permanent tariffs; and Count 3 sought approval of a compaction ratio of 3.1 cubic yards. The Board docketed Counts 1 and 3 as matters separate from the other counts in the petition and, on May 2, 1988, transmitted them to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* Essex subsequently abandoned its claims with respect to Count 3.

By Order dated August 5, 1988, this Board found WMNJ and Solid Waste Transfer to be public utilities subject to its general jurisdiction, joined them as parties to this proceeding, and compelled them to respond to discovery, giving them the option of designating themselves as either petitioners or respondents. Solid Waste Transfer subsequently assumed the status of petitioner; and WMNJ of respondent.

Evidentiary hearings commenced at the OAL on November 27, 1989. A total of 34 hearing days were held. Twenty witnesses were presented and over 100 exhibits introduced into evidence. Although several parties intervened in the proceedings, the only parties active throughout the entire proceedings were Essex, WMNJ, Solid Waste Transfer, Rate Counsel, Newark and Board Staff.

During the proceedings, the County was given notice by the Transfer Stations of claimed increases pursuant to annual Consumer Price Index (CPI) based escalator clauses contained in the contracts. By letter dated September 15, 1988, WMNJ notified the County of an increase in the service fee of 5.35 percent effective September 15, 1988. Newark filed a letter motion on September 26, 1988 seeking a declaratory ruling that no changes in tipping rates could be implemented without prior Board approval. On October 24, 1988, Essex filed a Supplement to its Petition requesting that the Board include within the scope of the County's rate proceedings, pending at the OAL, WMNJ's request for a 5.35 percent CPI increase. By Order dated January 4, 1989, the Board granted

this request and transmitted the CPI increase matter to the OAL to be made part of the pending proceeding. The Board denied Newark's motion for a declaratory order barring the CPI increase but barred implementation of CPI increases by WMNJ and Solid Waste Transfer pending resolution of their reasonableness.

On January 11, 1989, Essex filed with the Board a second Supplement to Petition so as to include in the proceedings a second noticeD of CPI increase by WMNJ of 4.66 percent effective August 1, 1989. On February 10, 1989, Solid Waste Transfer notice Essex of a CPI increase of 5.36 percent effective August 1, 1988; and on April 10, 1989, of a 5.6 percent CPI increase as of August 1, 1989. The County filed a third Supplement to Petition with the Board in February 1989 so as to include in the proceedings the notice of a 5.36 percent CPI increase from Solid Waste Transfer effective August 1, 1988.

During the pendency of the proceedings at the OAL, the Board also issued several rulings regarding host community benefits. By Order dated June 1, 1988, the Board approved a statutory minimum host community benefit for Newark of $.50 per ton, retroactive to August 1, 1987. On September 28, 1989, Newark and Essex filed a joint petition with the Board for approval of an annual host community benefit of $3.00 per ton for all solid waste disposed of at the Transfer Stations commencing September 1, 1988, increasing to $3.50 per ton effective January 1, 1989; and to $4.00 per ton effective June 1, 1989. The Board granted this request by Decision and Order issued on July 16, 1990.

On August 13, 1990, the record in this matter was closed and on December 26, 1990 the ALJ issued her Initial Decision which was received by the Board on December 27, 1990. Through a series of Orders, the statutory time period for

Board review of the Initial Decision in this matter was extended to August 9, 1991.[2]

We have reviewed the record below, the ALJ's Initial Decision, and the exceptions and replies thereto filed by the various parties to these proceedings. There are several major areas in which we disagree with the conclusions reached by the ALJ. Those areas involve: 2.

1) the standard of review;

2) the burden of proof; and

3) the reasonableness of CPI based increases.

Each of these areas is discussed separately below.

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[2] On August 6, 1991, shortly before the commencement of the publicly noticed Board meeting at which this was to be considered, SWTR submitted a letter claiming (1) that it had not received sufficient notice of the Board's meeting; and (2) that the Director of the OAL had not signed the Board's last extension Order in a timely manner. Consequently, SWTR argued that the Initial Decision had become effective on June 25, 1991. We find such arguments frivolous. First, the only notice to which SWTR was entitled was that required under the Open Public Meetings Act, *N.J.S.A.* 10:4-6 *et seq.* Such notice was given by the Board. In addition, as a courtesy, the Board's Secretary contacted all parties to this proceeding by telephone one day prior to the Board's August 6, 1991 meeting. SWTR received, therefore, notice greater than that which was required by law. Secondly, it is well-settled that the automatic approval provisions of *N.J.S.A.* 52:14B-10(c), which SWTR attempts to invoke, are to be applied with caution, especially where as here, their application would result in approval of an Initial Decision directly contrary to the agency's decision. See *King v. New Jersey Racing Commission*, 103 *N.J.* 412, 422, *Aurentz v. Planning Board of Little Egg Harbro Township*, 171 *N.J. Super* 135, 142 (Law Div. 1979). Here, the Board's extension Order was voted by the Board on June 19, 1991, was signed by the Board on June 24, 1991 and was submitted to the OAL on that date -- all prior to the expiration of the review period. That the Order was not co-signed by the OAL Director until a later date is a technicality which should not be viewed as barring the Board's instant decision. Even if SWTR were correct, however, we note our authority to reopen and reconsider any decision. Consequently, SWTR has based its argument on, at most, a harmless error.

I. *Standard of Review*

The ALJ premised her Initial Decision upon the conclusion that the contracts under review were negotiated on an arm's length basis in a competitive market and are, therefore, just and reasonable. In so doing, the ALJ ignored an express direction by the Board, in its February 10, 1989 Order, that the ALJ make findings concerning the reasonableness of the rates under a cost-based ratemaking analysis. The Board ordered that the case proceed under *both* the traditional rate base/rate of return approach as well as under the theory advocated by the transfer stations, namely, that the contracts were negotiated on an arm's length basis in a competitive market. The Board Order further indicated that at the conclusion of the case the Board would make a determination as to whether one or the other or possibly some combination of these two approaches should be applied in determining whether the contract fees are just and reasonable. The Board's February 10, 1989 Order explicitly stated:

> The record in this protracted case does not support WMNJ's position that the Board should ignore traditional rate base/rate of return analysis and rely exclusively on the theory that the contracts were negotiated on an arm's length basis in a competitive market. Rather it supports the conclusion that the case should go forward under both approaches, and when all the evidence is in, a judgment be made whether one or the other, or possibly, some combination of them be applied to determine whether the contracts' fees or charges are just and reasonable.

The ALJ, therefore, had an obligation under the Board's Order to analyze the contract rates from a cost-of-service standpoint and failed to do so.

In addition, through a series of Orders, beginning with our August 5, 1988 Order in this matter, the Board put Essex and the transfer stations on notice that contract charges and fees would not be accepted absent proof as to reasonableness. The Board's February 10, 1989 Order indicated that the contracts

were not subject to normal competitive conditions, but rather, were negotiated under the time pressures of an emergency situation. Far from freeing petitioners from their legal obligation to support the reasonableness of their rates via traditional ratemaking analysis, we specifically required cost-based data.

Our review of the record in this case persuades us that performance of a cost-based analysis of the proposed rates is imperative and we reject the ALJ's finding to the effect that such analysis need not be conducted because the contracts in question were negotiated on a competitive basis. We find that the contracts and the resulting rates were not competitively negotiated due to the fact that Essex County faced a July 31, 1987 deadline at the HMDC landfill. The County's only viable option was to enter into agreements with WMNJ and SWTR (Transcript, January 11, 1990, p. 40). The County's bargaining position was weak and not competitive because the transfer stations were awarded contracts and were incorporated into the solid waste management plan before a price had been agreed upon. (Transcript, January 11, 1990, pp. 36-37, 9[illegible], Exhibit P-1). In short, by the time price was negotiated, the County was locked in to the SWTR and WM transfer stations.

The ALJ's finding that despite its weak bargaining position Essex nevertheless "engaged in informed and intense negotiations regarding contract price", (Initial Decision, p. 97) is contradicted by the facts. Essex County, facing an immutable deadline, was, in effect, at the mercy of the only two entities who could logistically provide service by the July 31, 1987 date. That Essex let the contracts in accordance with law, that the procedures followed were appropriate, and that Essex made a full effort in negotiations, does not negate the fact that a competitive setting, with many able and willing sellers of services providing bids, simply did not exist. Normal competitive pressures cannot, therefore, be relied upon to assure the fairness of rates since the transfer stations had no competition when price was actually negotiated.

The ALJ points to the fact that the County received nine responses to the Solicitation of Interest (Initial Decision, p.

101). The reality was, however, that only four of the nine initial responses included a specific site for a transfer station (P-SWTR-4, p. 1; Initial Decision, p. 28), and only one of these four, SWTR, offered sufficient committed landfill capacity (Transcript, January 11, 1990, p 4; Initial Decision, pp. 30-31). Thus, the fact was not that the WMNJ and SWTR proposals were "technically superior to others," as mischaracterized by the ALJ (Initial Decision, p. 102), but rather that, as SWTR witness Mr. Karpinsky testified, SWTR and WM (when it later designated a site) were "basically" the only two responders that were qualified to perform the job (Transcript, January 11, 1990, pp 20-24).

The ALJ citing the testimony of Solid Waste Transfer's witness Mark Mauriello, found that the County "negotiated one vendor against the other" and took a "take-it or leave-it" stance with SWTR. (Initial Decision, pp 50-52). However, Mark Mauriello's only involvement in the contract discussions was his presence on the day the contracts were signed. He was not involved in any of the price discussions prior to that day, and furthermore played no role in establishing the price on that day (Transcript, January 3, 1991, p. 54; Transcript, January 5, 1991, p. 6 to p. 7). More importantly, in view of the circumstances, the County could not possibly "negotiate one vendor against the other." Neither WMNJ nor SWTR had the capacity to handle the expected 3500-410? tons of waste. At the time in question the County had no choice but to enter into an agreement with both facilities. As Solid Waste Transfer's witness Mr. Karpinsky testified, on July 1, 1987, the County's only alternative to garbage piling up on the streets on August 1, 1987 was to enter into contracts with WMNJ and SWTR (Transcript, January 11, 1991, pp 10-16).

In view of the above, the case for the fairness of the rates charged by the transfer stations must not rise or fall on the basis of the ALJ's perception of the negotiating skill of Essex County, which negotiated amidst an unprecedented crisis under a duopoly structure, but rather must be based on the circumstances which actually existed. Those circumstances belie

a competitive market. In the absence of competitive pressures ensuring reasonable rates, this Board will utilize a cost-of-service approach to determine the reasonableness of Essex County's rates. Such an analysis is set forth in Section IV of this Order.

II *BURDEN OF PROOF*

It is axiomatic that the burden of proof in a utility rate proceeding is on the utility. *Public Service Coordinated Transport of New Jersey* 5 *N.J.* 196,219 (1950); *In re Application of Saddle River*, 71 *N.J.* 14, 25-26 (1976). Although the ALJ acknowledges, at pp. 11-12 of her Initial Decision, that the burden of proof is on the utility seeking rate approval, she nevertheless placed the burden of presenting a cost-based analysis on Board Staff, Rate Counsel and the City of Newark. She did so by refusing to require the utilities herein to provide a rate of return/rate base analysis, reasoning that "...WMNJ and Solid Waste Transfer should not be ordered to present an affirmative case based on any specific methodology and/or to present evidence of a specific nature, Initial Decision, p. 11. We disagree. This Board, and the ALJ, in her role as hearer of fact, had the authority to require the utilities herein to provide all data and computations necessary to develop the fullest record for Board review. This could have, and, in light of the Board's February 10, 1987 Order, should have been done without prejudice to the utilities' position that a competitive market analysis should govern any ultimate determination. We once again emphasize, therefore, that the burden of demonstrating the reasonableness of the proposed rates was on the utilities herein and not on any other party to these proceedings.

III *THE REASONABLENESS OF CPI-BASED AUTOMATIC INCREASES*

As previously noted, the service contracts at issue herein contain provisions for automatic increases linked to increases in the CPI. Pursuant to such CPI provisions, Essex County has been billed as follows:

1) WMNJ has billed Essex for a 5.36 percent CPI cost-of-living price increase effective September 19, 1998, which claim totals $530,498 for 1988 and $1,909,921 for 1989.

2) Solid Waste Transfer has claimed and billed Essex for 5.36 percent CPI cost-of-living price increase effective August 1, 1988, which claim totals $312,146 for 1988 for Type 10 waste, $704,178 for 1989 for Type 10 waste, $519,080 for 1988 for Types 12, 23, 25 and 27 waste, and $1,210,450 for 1989 for Types 13, 23, 25 and 27 waste.

3) WMNJ has claimed and billed Essex for a 4.6 percent CPI cost-of-living increase effective August 1, 1989, which claim totals $732,564 for 1989.

4) Solid Waste Transfer has claimed and billed Essex for a 4.66 percent CPI price increase effective August 1, 1989, which claim totals $273,244 for 1989 for Type 10 waste and $408,395 for 1989 for Types 13, 23, 25 and 27 waste.

The ALJ accepted as reasonable the automatic CPI-linked increases provided for in the contracts been Essex County and the transfer station operators, again reasoning that the CPI provisions were part of a competitively bid contract. She conducted no cost analysis with respect to the CPI based increases.

As set forth above, we reject the premise that a competitive market existed here. In addition, with specific reference to the reasonableness of CPI-based increases, we note that there are fundamental problems involved with linking rate increases at solid waste transfer stations to the CPI. The major components of transfer station costs are depreciation, landfill disposal costs, transportation costs, return on investment and salaries. These cost components do not automatically increase

at the same rate as the CPI. The record presented by the petitioners did not demonstrate a nexus between anticipated changes in transfer station operating costs and the CPI.

Moreover, in *In the Matter of the Application of SES Gloucester*, BPU Docket No. SE85100984, a case cited in support of the CPI-linked increases, we accepted a Producer Price Index based escalation clause only after it was tied to a rate base/rate of return analysis and coupled with an ongoing annual earnings review. We also note that there exist escalator clauses in other contracts reviewed by this Board (e.g. contracts for resource recovery plants) but that such escalator clauses are tailored to reflect the type of costs associated with the particular operation. Thus, a "weighted" or "blended" escalation formula, which takes into consideration a variety of financial indices relevant to the subject matter under review, provides the necessary assurance of reasonableness in such circumstances.

Absent such safeguards, sound regulatory policy and law militates against automatic rate increases based upon CPI escalators. The CPI reflects inflation in such areas as food, housing and electronic goods, and thus bears little relationship to increases in costs in the solid waste industry. Reflecting this policy, the Board has "consistently refused to recognize increases associated with general inflationary factors." *See Petition of Elizabethtown Water Company*, 11 *N.J.A.R.* 303, 337 (OAL 1984), *reversed on other grounds*, 205 *N.J* Super 528 (App. Div. 1985), *affirmed as modified*, 107 *N.J* 440 (1987). *See Re Jersey Central Power & Light Company*, 65 *PUR* 4th 175 (N.J.B.P.U. 19855); Re Commonwealth Water Co., 7 PUR 4th 456 (N.J.B.P.U. 1974); *In re Otter Trail Power Co.*, 21 PUR 4th 254 (S.D.P.U.C. 1977) ("The effects of inflation on a company do not in any reasonably accurate manner parallel those contained in the [the CPI]."

Accordingly, because the transfer stations failed to create a record that would support an automatic rate increase tied to a consumer price index, or in the alternative, demonstrate known and measurable cost increases which could reasonably

be foreseen, the transfer stations are not entitled to approval of the CPI-linked rate increases and we REJECT the ALJ's acceptance of such increases.

Consequently, we adjust the contracts between Essex and WMNJ and Essex and Solid Waste Transfer so as to render non-binding the CPI-linked rate increase provisions therein. We do so pursuant to our general rate making authority over public utilities as set forth in *N.J.S.A.* 48:2-21 and more specifically, pursuant to the authority vested in this Board under *N.J.S.A.* 48:13A-7 which states in pertinent part:

> The board, upon complaint or its own initiative, after hearing, may direct any person engaging in the solid waste collection business or the solid waste disposal business to furnish proof that the charges or rates to be received for such service do not exceed just and reasonable rates or charges for such.
>
> * * *
>
> Should the board find that the rates or charges are excessive then it may order the person charging such excessive rates or charges to make an adjustment in the contract to a sum which shall result in just and reasonable rates or charges.

With reference to the Board's authority to modify solid waste utility contracts, see also In *re Application of Borough of Saddle River, supra.*

IV *COST OF SERVICE ANALYSIS*

We turn now to the question of establishing a rate for the Essex County transfer stations which reflects cost of service. As previously noted, WMNJ and Solid Waste Transfer limited their presentation at the OAL to the competitive market theory. The ALJ similarly limited her analysis of the record before her. However, Board Staff, using 1988 revenue requirements did present for our consideration a cost based analysis. Staff recommended to the ALJ and to this Board certain adjustments to the interim initial rates of WMNJ and

Solid Waste Transfer. The adjustments to the interim rates recommended by Board Staff and agreements in support thereof are summarized below:

A. Adjustment to interim initial rate of WM

1) *Depreciation expense*: Staff argues that certain identified pieces of utility property (i.e., transfer trailers, vehicles and equipment, machinery) should not be included in the operations of the WM transfer station operations because said transferred utility property was not used and useful for transfer station services. This adjustment would result in a reduction of $151,018 or $.40 per ton.

2) *Intercompany interest expense*: With respect to Interest Expense — Inter Company, Staff argues that this expense is a below the line operating expense, and should be excluded in the computation of rates. Staff argues that interest compensation to affiliates is already duly reflected in rate of return. Staff recommends disallowance of this amount in WMNJ operation expenses. This adjustment would result in a reduction of $533,590 of $1.40 per ton.

B. Adjustments to the interim initial rate of SWT&R

1) *Lease Expense*:

SWTR entered into a lease agreement (Exhibit P-SWTR-1, P-2) with GLOPAK Corporation on June 22, 1987. Under the terms of the lease GLOPAK Corp. leased 4.7 acres of land located on 442-470 Frelinghuysen Avenue, Newark, New Jersey for a term of five years commencing on August 1, 1987 and ending July 31, 1992.

SWTR agreed to pay $75,000 per month or $900,000 per year. The lease agreement gave SWTR the right to demolish existing buildings on the site and to erect a structure that will remain on the premises at the expiration of the term of the lease at no cost to GLOPAK Corp. SWTR agreed to incur all costs for demolishing existing buildings on the site, and SWTR agreed to bear all costs in connection with any ECRA (Environmental Clean-Up Responsibility Act) responsibilities.

Staff notes that GLOPAK Corp. is owned by several persons. Harold Martin, Sr. owns 37 percent, his wife Barbara Martin owns 51 percent, Joseph Solomon owns 10 percent, and Cyndree Martin and Harold Martin, Jr., Harold Martin, Sr.'s daughter and son each own 1 percent. (Transcript, April 19, 1990, p. 67, lines 18-22).

Harold Martin, Sr. became shareholder in SWTR on July 23, 1987 after SWTR was designated a transfer station operator in Essex County (Transcript, April 19, 1990, pg. 118, lines 22-25). He invested $20,000 and acquired 20 percent of the equity (Prefile Testimony P-SWTR-2, p. 6). The total equity of SWTR at the time he became a shareholder was $100,000 (Transcript, April 19, 1990, p. 118, lines 14-16). Staff argues that Harold Martin, Sr.'s involvement with GLOPAK and SWTR renders the lease agreement less than "arms length". In addition, Staff notes the testimony of John O. Lasser, offered by the City of Newark as an expert to appraise the value of the property. Mr. Lasser estimated the fair net rental value as of August 1, 1987 at $129,000 per

year. Staff therefore recommends that the Board adjust lease expense accordingly.

2. *Real Estate Taxes*:

Based on Newark witness Lasser's evaluations, the $79,985.48 calculation for real estate taxes for 1989 was for the whole property of 5.7 acres. SWTR leases 4.7 acres or 82 percent of the total property. The lease states that the landlord will bill SWTR for its proportionate share. Therefore, staff recommends real estate taxes for 1989 in the amount of $65,588 or 82 percent to $79,985.48.

3. *Legal Expenses*:

Staff's recommendation regarding legal expense from January 1989 to July 31, 1990 is based on SWT&R witness Joseph Maurielo's testimony which he approximates a reduction of $175,000 of the 1988 legal expense of $436,012 (which is the amount identified in the 1988 annual report exhibit, p-16, pg. 35).

We have reviewed Board Staff's and City of Newark's proposed adjustments to WM and SWTR's interim rates and do not find them warranted. With respect to the SWTR's lease expense reduction, the ALJ found no collusive or improper relationships which would render the lease less than arms-length. We adopt her findings in this regard. Also, the Lasser appraisal was rebutted by the testimony of Richard Marashlean. In the face of two conflicting appraisals and in the presence of what the ALJ found to be an arms-length agreement, we reject staff's proposed adjustment of SWTR'S lease expense.

We similarly reject the other proposed adjustments of the City of Newark Rate Counsel and Staff to SWTR's and

WM's interim rates as not based on adequate support in the record. For all the foregoing reasons, we hereby FIND:

1. that the service contracts between Essex and WM and Essex and SWTR were not negotiated in a competitive market and, therefore, the reasonableness of rates resulting from such contracts must be based upon a cost-of-service analysis;

2. that the burden of proving the reasonableness of the proposed rate was on the utilities herein;

3. that the record is devoid of any evidence establishing a specific nexus between the costs of transfer station operation and changes in the Consumer Price Index;

4. that the CPI-based escalator clauses contained in the service contracts herein are non-binding and cannot be implemented;

5. that the record developed below supports the reasonableness of the interim rates approved by the Board in the proceeding; and

6. that neither increases nor decreases in such interim rates are warranted based on the record before us.

Therefore, the interim rates approved by this Board and currently in effect for Essex County's Avenue A and Avenue F Transfer Stations are *HEREBY* made FINAL. The Initial Decision is modified accordingly. Permanent tariff sheets conforming with this determination are to be filed with the Board within five (5) days of receipt of this Order.

DATED: August 8, 1991

ATTEST:

/s/ Chrys Wilson
CHRYS WILSON
SECRETARY

BOARD OF PUBLIC UTILITIES
BY:

/s/ Edward H. Salmon
DR. EDWARD H. SALMON
PRESIDENT

/s/ Jeremiah P. O'Connor
JEREMIAH P. O'CONNOR
COMMISSIONER

/s/ Carmen J. Armenti
CARMEN J. ARMENTI
COMMISSIONER

Appendix E

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. PUC 3173-88
AGENCY DKT. NOS. SE87070552
and SE87070566

IN THE MATTER OF THE COUNTY OF ESSEX (1) FOR APPROVAL AND CONTINUATION OF INTERIM SOLID WASTE DISPOSAL RATES AND (2) FOR APPROVAL OF CUBIC YARD CONVERSION RATIO OF 3:1

H. Curtis Meanor, County Counsel, **Norman Schulaner,** Assistant County Counsel, **Frank Becz,** Assistant County Counsel, **Sheila Genovese,** Assistant County Counsel, and **Thomas Bachman,** Assistant County Counsel, for the County of Essex, petitioner
(H. Curtis Meanor, County Counsel, attorney)

Joseph M. Cerra, Esq., **Charles A. Reid III,** Esq., and **Antoinette Bennett,** Esq., for Solid Waste Transfer and Recycling Inc., petitioner
(Shanley & Fisher, attorneys)

Theodore A. Schwartz, Esq., and **Sandra T. Ayres,** Esq., for Waste Management of New Jersey, Inc., respondent
(Schwartz, Tobia and Stanziale, attorneys)

Howard T. Rosen, Esq., **Thomas A. Penn,** Esq., **Harvey C. Kaish,** Esq., and **Richard Epstein,** Esq., for the City of Newark, intervenor
(Clapp & Elsenberg, P.C. attorneys)

Michael Critchley, Esq., for the City of Orange, intervenor

John N. Malyska, Esq., and **Jane E. Solomon,** Esq., for the Township of Glen Ridge, intervenor
(Meyner & Landis, attorneys)

Thomas McCormack, Esq., for the Township of Caldwell, intervenor
(McCormack & Petrolle, attorneys)

Mumtaz Bari-Brown, Deputy Public Advocate, **Badrhn M. Ubishin,** Assistant Deputy Public Advocate, **Amy P.K. Motzenbecker,** Assistant Deputy Public Advocate, **Jacqueline Hardy,** Assistant Deputy Public Advocate, **Ellen B. Maughn,** Assistant Deputy Public Advocate, **Joseph Quirolo,** Assistant Deputy Public Advocate, and **Philip Bauknight,** Assistant Deputy Public Advocate, for the Division of Rate Counsel, Department of the Public Advocate, intervenor
(Wilfredo Carabello, Public Advocate of New Jersey, attorney)

Helene S. Wallenstein, Deputy Attorney General, and **Charles S. Cohen,** Deputy Attorney General, for the Staff of the Board of Public Utilities
(Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: August 13, 1990

Decided: December 26, 1990

BEFORE **DIANA C. SUKOVICH, ALJ:**

PROCEDURAL HISTORY

On July 16, 1987, the County of Essex (Essex, County or petitioner) filed an application with the Board of Public Utilities (Board) for a Certificate of Public Convenience and Necessity (Certificate) for three solid waste transfer stations and for approval of contracts which Essex had entered into with two companies, Waste Management of New Jersey, Inc. (WMNJ or respondent) and Solid Waste Transfer and Recycling, Inc. (Solid Waste Transfer or petitioner) to construct and operate the transfer stations. The County requested expedited interim approval of its application in light of an August 1, 1987 deadline for the initiation of operations of the transfer stations.

Essex filed a schedule of proposed tariffs on July 20, 1987. The Board conducted a public hearing on the County's application for initial interim rates on July 28, 1987. By order dated July 31, 1987, the Board approved the County's proposed tariff rates as interim solid waste disposal rates; accepted the contracts between Essex and Solid Waste Transfer and Essex and WMNJ; issued Certificates to Essex and to WMNJ for a transfer station (Avenue A or Transfer Station) located at 100 Avenue A and to Solid Waste Transfer for a transfer station (Avenue F or Transfer Station) located at 442-444 Frelinghysen Avenue, both of which are located in Newark, New Jersey.[1] By order of October 27, 1987, the Board awarded a franchise to Essex for the disposal of solid waste within the County pursuant to the Solid Waste Utility Control Act of 1970, *N.J.S.A.* 48:13A-1 *et seq.*

In December of 1987, the Staff of the Board's Division of Solid Waste (Staff) propounded interrogatories on Essex. The County responded regarding its per ton administrative charge. In January of 1988, the Staff propounded data requests upon WMNJ and Solid Waste Transfer regarding contract costs. Solid Waste Transfer and WMNJ declined to respond to what they deemed to be inappropriate requests.

On February 4, 1988, the County filed a supplemental petition with the Board. Count 1 of the petition sought approval of the interim rates as permanent tariffs; and Count 3 sought approval of a compaction ratio of 3.1 cubic yards. The Board docketed Counts 1 and 3 as matters separate from the other counts in the petition and transmitted them to the Office of Administrative Law (OAL) on May 2, 1988 for determination as a contested case pursuant to *N.J.S.A.* S2:14F-1 *et seq.*

An initial prehearing conference was held on June 22, 1988, and a prehearing order was issued on July 7, 1988. Numerous prehearing, status, settlement, and other conferences

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[1] The Board subsequently characterized the Certificates issued to WMNJ and Solid Waste Transfer as "Sub-Certificates," Decision and Order dated August 5, 1988, p. 1. See footnote 3, *infra.*

were held throughout the proceedings. Amended prehearing orders were issued on September 6, 1988; November 3, 1988; January 4, 1989; February 23, 1989; July 27, 1989; September 5, 1989; and October 5, 1989.

Numerous motions, rulings, and appeals were made during the course of the proceedings. Many of the procedural aspects of the matter involved discovery claims and controversies, although several also pertained to significant substantive issues. Several of the more significant ones will be highlighted.

During the course of the proceedings, the City of Newark (Newark or intervenor) adopted as its own the interrogatories which had previously been served by the Staff on WMNJ and Solid Waste Transfer in January of 1988. In May 1988, Newark moved to compel responses and, in the alternative, sought joinder of WMNJ and Solid Waste Transfer as parties. On June 22, 1988, I orally denied the motion in its entirety[2]. The Board granted interlocutory review and, by Order dated August 5, 1988, deemed the Transfer Stations to be public utilities subject to its general jurisdiction, joined WMNJ and Solid Waste Transfer as parties, and compelled them to respond to discovery, giving them the option of designating themselves as either petitioners or respondents. Solid Waste Transfer subsequently assumed the status of petitioner; and WMNJ, of respondent. WMNJ filed a motion for rehearing, reconsideration and reversal of the August 5, 1988 Order and a motion for a stay of the Board's ruling and evidentiary hearings on the issue of WMNJ's status as a public utility on August 25, 1988. WMNJ also filed a motion with the Appellate Division of Superior Court for leave to appeal on an interlocutory basis from the August 5, 1988 Order on August 28, 1988. The Board denied the motion for rehearing, reconsideration and reversal and for a stay by Decision and Order dated September 14, 1988. By letter dated September 28, 1988, the Board denied WMNJ's request for evidentiary hearings on its status as a public utility. On October 14, 1988,

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[2] This ruling was memorialized by letter issued July 12, 1988.

WMNJ filed with the Appellate Division a motion for leave to appeal from the Board's September 28, 1988 letter ruling. By Order dated November 17, 1988, the Appellate Division denied both of WMNJ's motions for leave to appeal.

Discovery progressed, albeit slowly, throughout the proceedings. Several of the procedural aspects should be highlighted. WMNJ provided responses to the Staff's interrogatories on September 29, 1988, objecting to them as being beyond the scope of legitimate discovery. Newark filed a motion in October 1988 to compel substantive answers to the Staff's interrogatories, which motion was joined by the Staff. I granted the motion on December 12, 1988, and WMNJ subsequently petitioned the Board for interlocutory review, which review was granted. By Order dated February 10, 1989, the Board ordered production of substantive responses within 15 days. WMNJ filed a motion with the Appellate Division for leave to appeal from the February 10, 1989 Order, which motion was denied on April 4, 1989. WMNJ then filed a motion for leave to appeal with the Supreme Court, which motion was also denied. In the interim, WMNJ had also filed with the Board a motion for reconsideration and review of the February 10, 1989 Order. By Order dated March 30, 1989, the Board denied this motion and ordered substantive responses to be filed within five days. WMNJ filed an emergent interlocutory appeal with the Appellate Division, which appeal it subsequently withdrew. One result of this litigation was that initial substantive discovery responses were not served in response to the Staff's original interrogatories until April 1989.

During the pendency of the proceedings, the parties also filed several positions and formal motions regarding the level of rates reflected in the contracts with the Transfer Stations. In the fall of 1988, Newark filed a motion with the Board requesting a $40 per ton reduction in the County's rates and contract payments to WMNJ and Solid Waste Transfer. The Board denied this motion by Order of October 21, 1988.

During the proceedings, the County was given notice by the Transfer Stations of claimed increases pursuant to annual Consumer Price Index (CPI) - based escalator clauses contained in the contracts. By letter dated September 15, 1988, WMNJ notified the County of an increase in the service fee of 5.35 percent effective September 15, 1988. Newark filed a letter motion on September 26, 1988 seeking a declaratory ruling that no changes in tipping rates could be implemented without prior Board approval. On October 24, 1988, Essex filed a Supplement to its Petition requesting that the Board include within the scope of the County's rate proceedings, transmitted to and pending at the OAL, WMNJ's request for a 5.35 percent CPI increase. By Order dated January 4, 1989, the Board granted this request and transmitted the CPI increase matter to the OAL to be made part of the pending proceeding. The Board denied Newark's motion for declaratory order barring the CPI increase and also barred implementation of CPI increases by WMNJ and Solid Waste Transfer pending a resolution of their reasonableness. WMNJ subsequently filed an emergent motion with the Board for reconsideration and vacation of the January 4, 1989 Order and for a stay pending reconsideration; WMNJ also filed a motion with the Appellate Division for leave to appeal from the Board's January 4, 1989 Order and for a stay of action thereon pending a Board decision on the motion for reconsideration. The Appellate Division granted the motion on February 22, 1989, on which date the Board also denied WMNJ's motion for reconsideration. On November 30, 1989, the Appellate Division vacated its earlier Order and dismissed the appeal. In the interim, WMNJ filed a motion with the Appellate Division for leave to appeal from the Board's February 22 Order on reconsideration, which motion was denied on April 4, 1989. WMNJ then unsuccessfully sought leave to appeal from the Appellate Division's Order to the New Jersey Supreme Court.

On January 11, 1989, Essex filed with the Board a second Supplement to Petition to include in the proceedings a second notice of a CPI increase by WMNJ of 4.66 percent effective August 1, 1989. On February 10, 1989, Solid Waste Transfer noticed Essex of a CPI increase of 5.36 percent effective

August 1, 1988; and on April 10, 1989, of a 5.6 percent CPI increase as of August 1, 1989. The County filed a third Supplement to Petition with the Board in February 1989 to include in the proceedings the notice of a 5.36 percent CPI increase from Solid Waste Transfer effective August 1, 1988.

On February 9, 1989, I ruled that the Division of Rate Counsel (Rate Counsel) of Department of the Public Advocate was required to bear the reasonable costs incurred by other parties to respond to its discovery demands. The Board reversed this ruling in an Order issued on March 16, 1989. By Order dated February 10, 1989, the Board upheld certain of my rulings on discovery issues and the nature of proofs. By letter dated March 1, 1989, WMNJ advanced the position that the Staff is responsible for the costs of discovery which it proposed. At my direction, the letter was treated as a motion, and I denied such request by Order issued on March 23, 1989. On October 12, 1989 and November 8, 1989, I quashed certain interrogatories of Rate Counsel as being untimely. I subsequently reversed my orders regarding some of them.

On March 21, 1989, WMNJ filed a motion to disqualify Newark's then current counsel, which motion was joined by Solid Waste Transfer. I granted the motion by Order issued on June 9, 1989. On June 14, 1989, Newark filed a letter requesting that I issue a stay of the June 9, 1989 order as it pertained to disqualification of counsel. This request was denied by order issued on June 26, 1989. On July 3, 1989, the Honorable Jaynee LaVecchia, Director and Chief Administrative Law Judge of the OAL, issued an Order granting Newark's request for interlocutory review and staying my disqualification order pending a decision on interlocutory appeal. My Order was subsequently affirmed on interlocutory appeal by Judge LaVecchia.

On September 25, 1989, Newark filed a motion with the Board for an order requiring the Count to implement an $82.50 per ton reduction in the County's payments to Solid-Waste Transfer and WMNJ. Alternatively, Newark sought a Board Order requiring the Transfer Stations to post surety

bonds for millions of dollars, which Newark alleged would be forthcoming in rebates. WMNJ filed a cross-motion to require Essex to increase tipping fees. Both motions were denied by Board Order issued October 30, 1989.

During the course of the proceedings, oral rulings were rendered upon motions relating to claims of proprietary information. I issued a written protective order on May 22, 1990.

The Board issued several rulings regarding host community benefits during the course of the proceedings. By Order dated June 1, 1988, the Board approved a statutory minimum host community benefit for Newark of $.50 per ton, retroactive to August 1, 1987. On September 28, 1989, Newark and Essex filed a joint petition with the Board for approval of an annual host community benefit of $3.00 per ton for all solid waste disposed of at the Transfer Stations commencing September 1, 1988, increasing to $3.50 per ton effective January 1, 1989; and to $4.00 per ton effective June 1, 1989. The Board granted this request by Decision and Order issued on July 16, 1990.

Evidentiary hearings commenced on November 27, 1989 and concluded on April 27, 1990, reflecting a total of 34 hearing days. Although several parties intervened in the proceedings, the only parties active throughout the entire proceedings, and during the hearings, were Essex, WMNJ, Solid Waste Transfer, Rate Counsel, Newark and the Staff. Subsequent to completion of hearings, I directed that simultaneous initial and reply post-hearing briefs were to be filed. Initial briefs were to be filed on May 25, 1989; and reply briefs, on June 4, 1989. A one-week extension of the initial deadline was granted at the request of the Staff. A subsequent second one-week extension was granted at the request of Rate Counsel. By letter dated June 8, 1989, counsel for the Staff advised that because of computer related difficulties, the Staff's initial brief would be filed on June 12, 1990, which deadline was subsequently extended at the Staff's request to the week of June 18, 1990. Petitioners, respondent, Rate Counsel and

Newark filed initial briefs on June 8, 1990. The Staff filed an initial brief on June 25, 1990. At the request of Solid Waste Transfer, the deadline for the filing of reply briefs was extended until July 13, 1990, which deadline was extended, at my direction, until July 16, 1990. Petitioners, respondent, Newark and the Staff filed reply briefs on July 16, 1990. Rate Counsel did not file a reply brief.

On June 12, 1990, WMNJ filed a motion to strike portions of Newark's initial post-hearing brief and impose sanctions on Newark By order issued on June 26, 1990, I struck the referenced portions of Newark's brief and denied the request for sanctions. On June 13, 1990, Newark filed a motion to strike portions of WMNJ's initial post-hearing brief and to impose sanctions on WMNJ. I denied this motion by order issued on July 6, 1990. Finally, on July 2, 1990, WMNJ filed a motion to strike portions of the Staff's initial post-hearing brief, which motion I substantially granted by Order issued on July 19, 1990. Both Newark and the Staff were ordered to file initial briefs eliminating the materials stricken, which documents were to supersede the post-hearing briefs initially filed by both parties.

At the close of the hearings, the parties were directed to incorporate detailed record and other citations, as well as proposed findings of fact and conclusions of law, in their briefs. By letters dated July 11, 1990, the Staff was requested to provide support citations for certain specified portions of its initial brief, as well as detailed proposed findings of fact and conclusions of law; Rate Counsel, to provide support citations for certain portions of its brief and to clarify whether of Rate Counsel was taking a position on a specific tariff rate and, if so, to provide the numbers reflecting such a position; and Essex, specific proposed conclusions of law in reference to its initial brief. Each party was given a deadline of seven days. In response, the County filed proposed conclusions of law on July 20, 1990. The Staff replied by letter filed on August 13, 1990, on which date the record was closed. Rate Counsel did not comply with the applicable directives. The deadline for

the issuance of an initial decision was ultimately extended to December 26, 1990.

NATURE OF THE CASE

As noted hereinabove, Counts 1 and 3 of the County's verified supplemental petition were docketed as separate matters and transmitted to the OAL in May 1988. Counts 1 and 3 sought approval of the interim tariff rates as permanent rates and approval of a 3.3 cubic yards compactor ratio, respectively. Essex abandoned its claims regarding Count 3 during the course of these proceedings, and Count 3 will not be addressed on its substantive merits. Count 3 should be, and is hereinafter, dismissed. Essex's Supplement to its Petition of October 24, 1988 was also, as noted hereinabove, transmitted to the OAL. The contract between Essex and WMNJ expired on January 31, 1990. By petition filed with the Board on January 29, 1990, WMNJ sought approval of an initial tariff for the Avenue A Transfer Station, which petition was amended by letter dated March 1, 1990. The Board entered an interim Decision and Order on April 18, 1990 approving an interim tariff, subject to refund, and transmitting WMNJ's petition to the OAL. This matter is not part of the pending case and is not addressed hereinafter.

This case, broadly speaking, involves determinations of the reasonableness of the interim tariff rates charged by Essex, the reasonableness of the underlying contracts between Essex and Solid Waste Transfer and the County and WMNJ, and whether or not refunds should be ordered. In its Order of July 31, 1987, the Board addressed three matters, broadly speaking, pertinent to the current proceeding. The Board approved, on an "interim, initial, emergent, basis," tariff rates for the County at the total levels requested of $100.15 per ton for Type 10 waste and $107.85 per ton for Types 13, 23, 25 and 27 waste; accepted the contracts in question for the operation of the Transfer Stations; and determined that in the event scales were not operational at the Transfer Stations, rates would be charged on a cubic yard basis using a 3.3 compactor

ratio, Order dated July 31, 1987, p. 1.[3] In a subsequent order, the Board allowed recovery of a $.50 per ton minimum host benefit surcharge. The rates subject to review in this proceeding are $100.65 per ton for Type 10 waste and $108.25 per ton for the other types of waste.

The Board subsequently made clear that the determination of the reasonableness of the tariff rates charged by Essex is integrally related to and dependent upon resolution of the question of the reasonableness of the underlying contracts. The Board not only reaffirmed the interim nature of the tariff rates, which rates were subject to refund, but noted that the Transfer Stations have the burden of proving the reasonableness of the service fees and charges to Essex under the contracts. Decision and Order Upon Interlocutory Review dated August 5, 1988. In its Decision and Order of January 4, 1989, the Board clarified and expanded upon its Order of July 31, 1987, noting issues raised regarding its prior "acceptance" of the contracts in question, Decision and Order dated January 4, 1989, p. 2. The Board reiterated that the current proceedings involve not only a determination of the reasonableness of the County's tariff rates (tipping fees) but also determinations of the reasonableness of Essex's contracts with, WMNJ and Solid Waste Transfer and the service fees or charges provided therein. In this respect, the Board stressed that its prior "acceptance" of the contracts, as well of Essex's rates, was on an "interim initial basis" and that it had not yet determined the reasonableness of the service fees, including the CPI escalator clauses, *Id.* p. 3. The relationship between the tariff rates and the contract terms, as well as the fact that the reasonableness of both are the ultimate issues to be determined in this case, were subsequently reemphasized in the Board's Decision and Order Upon Interlocutory Review of February 10, 1989. It is also apparent that the Board contemplates an adjustment of the contract terms for ratemaking purposes, as well as an adjustment in the County's tariff rates, with a refund if the tariff

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[3] Citations to Board decisions and orders and OAL orders will omit, to avoid redundancy, docket numbers and case name.

rates are reduced, *See, e.g.*, Decision and Order dated February 22, 1989.

It is clear, as noted hereinabove, that the broad issues to be resolved in this proceeding are the reasonableness of Essex's tariff rates, the reasonableness of the underlying contract terms, whether any adjustments should be made in the tariff rates, whether the contract terms should be modified for rate-making purposes and in the exercise of the Board's general jurisdiction, and the calculation of any refunds if the tariff rates are deemed to be unreasonably high. The resolution of these issues, in turn, depends upon consideration of numerous disputed underlying issues and factual contentions, which, to a large extent, reflect the parties' differing views of the standard of proof to be applied.

In its July 31, 1987 Order, the Board, as noted hereinabove, ordered the granting of Certificates to petitioners and respondent. In my ruling of June 22, 1988, I noted that it is reasonable to infer from the Board's issuance of Certificates to Solid Waste Transfer and WMNJ that the Board has deemed those entities to be public utilities subject to its general jurisdiction. In its Decision and Order of August 5, 1988, the Board made it clear that it did so, Decision and Order dated August 5, 1988, pp. 2-3, *See, also*, Decision and Order dated January 4, 1989, pp. 2-3, Decision and Order dated February 10, 1989, p. 2, and Decision and Order dated February 22, 1989, p. 2.

The parties raise issues in their briefs regarding the burden and standard of proof applicable in this proceeding. The issues focus, to a greater extent, upon the question of the appropriate standard of proof. Solid Waste Transfer and respondent argue that the reasonableness of the contract terms and, inferentially, of the tariff rates, must be determined by the criterion of whether the applicable contracts were the result of arms-length negotiations in a competitive market. Essex argues that the burden of proof is upon those challenging the County's initial tariff rates and that the standard of proof is to demonstrate that the County's decision to provide a certain level of transfer station administrative services was

arbitrary, capricious and a clear abuse of discretion. Newark, the Staff and Rate Counsel argue that the burden of proof is upon petitioners and respondent and that the standard of proof which must and should be applied is a rate base/rate of return analysis such as is generally used in determining proposed rate increases for traditional utilities whose rates are not based upon contracts.

The issue of the burden of proof was litigated and resolved during the proceedings, and I therefore do not discuss it in great detail herein. On February 9, 1989, I rendered an oral ruling that the burden of proof by a preponderance of the credible evidence to demonstrate the reasonableness of the rates in question is upon petitioners and respondent. That ruling was incorporated in the amended prehearing order of February 23, 1989 and reaffirmed in an order issued by me on March 22, 1989. The March 22, 1989 order also held that WMNJ and Solid Waste Transfer should not be ordered to present an affirmative case based on any specific methodology and/or to present evidence of a specific nature. During the pendency of the proceedings, I orally ruled that proofs could proceed on the basis of comparable rates, rate base/rate of return, arms-length contracts, as well as other approaches, as such approaches were alternative means of determining the ultimate issue of the reasonableness of rates and that no one approach was mandated by law to determine the reasonableness of initial tariff rates reflecting contracts, as opposed to an increase in tariff rates and rates not based upon contracts.

The Board has recognized throughout the proceedings that the burden of proof is upon petitioners and respondent. In its Decision and Order of February 22, 1988, the Board noted that pursuant to *N.J.S.A.* 48:13A-7, it had ". . . directed WMNJ to furnish proof that the charges or rates to be received by it under its contract with Essex do not exceed just and reasonable rates or charges for its service. . ." Decision and Order dated February 22, 1989, p. 2. In its Decision and Order of August 5, 1988, it noted that "As public utilities, the Transfer Stations must bear the burden of justifying the reasonableness of their rates, i.e., the services fees and charges

for Essex under the contracts," Decision and Order dated August 5, 1988, p. 3. *See, also*, Decision and Order dated February 10, 1989, p. 4, and Decision and Order dated January 4, 1989, pp. 2-3. The Board also affirmed my rulings regarding the applicable standard of proof, Decision and Order dated February 10, 1989.

I **CONCLUDE** that the burden of proving the reasonableness of the County's tariff rates and the terms of the underlying contracts is upon petitioners and respondent, that an arm's length competitive contract, rate base/rate of return, and comparable rates approaches are relevant, permissible approaches to determine the reasonableness of tariff rates and the underlying contracts, and that such approaches are not mutually exclusive nor exclusive to other possible approaches. These conclusions do not address the question, however, of a preferable regulatory approach to be used in this case. Based upon a review of the entire record, and consideration of the positions of the parties, I am persuaded that an arms-length competitive market approach is the most reasonable one to be used in this proceeding. This conclusion is discussed in more detail hereinafter subsequent to the articulation of findings of fact.

FINDINGS OF FACT

As is apparent from the extended prehearing procedures in this matter, broad discovery opportunities were afforded the parties. Discovery was permitted to proceed on the basis of the various theories to be advanced and/or developed by the parties, including a rate base/rate of return approach. Hundreds of detailed interrogatories were propounded and served, generally upon Solid Waste Transfer and WMNJ, and responded to unless quashed. A total of nine depositions were taken, generally over objections, including depositions of three representatives of WMNJ requested by Newark. Pursuant to my direction, direct testimony was prefiled for all except subpoened witnesses. Rebuttal and surrebuttal testimony was allowed. More than 6,000 transcript pages were developed during the hearings.

Essex presented the testimony of Martin M. Lund, Jr. (Lund) and Joseph P. Galluzzi (Galluzzi); Solid Waste Transfer, Mark L. Mauriello (M. Mauriello), Harold Martin, Sr., (Martin, Sr.), Anthony Ross (Ross), Dr. James L. Bicksler (Bicksler), Joseph P. Wiley, III (Wiley), Peter Cerenzio (Cerenzio), Peter Sepelya (Sepelya), Joseph Mauriello (J. Mauriello), Richard Marashlian (Marashlian), and Robert E. Karpinsky (Karpinsky); WMNJ, Henry G. Mullee (Mullee), John Guastella (Guastella) and E. S. Savas (Savas); Rate Counsel, Dr. James A. Rothschild (Rothschild) and James D. Cotton (Cotton); and Newark, John O. Lasser (Lasser), Garrett Smith (Smith), and Dr. Barbara J. Stevens (Stevens).

Lund and M. Mauriello testified regarding operations. M. Mauriello also testified regarding negotiations between Essex and Solid Waste Transfer and implementation of operations at the Avenue F Transfer Station. Galluzzi testified regarding financial information, as did J. Mauriello. Karpinsky and Wiley testified regarding the establishment of Essex's transfer station program. Bicksler testified on risk; Martin Sr., Lasser and Marashlian, regarding a leasing arrangement between Solid Waste Transfer and Glopak Corporation (Glopak). Mullee testified regarding the appropriateness of an operating ratio approach, and Guastelia testified regarding the overall reasonableness of the contracts, as did Stevens. Stevens focused upon transportation and dumping fees in this respect. Rothschild testified on rate of return, and Cotton testified regarding rate base, both assuming a rate base/rate of return approach.

The record in this matter is, as indicated, extensive. In order to expedite the matter, I generally set forth my findings of fact without an extensive discussion of the record. During the course of the proceedings, I ruled that petitioners and respondent bear the burden by proof by a preponderance of the credible evidence in this proceeding. Such standard requires a showing of the greater weight of credible evidence and that the truth of the proposition argued is more probable than not, *See, State v. Lewis*, 67 *N.J.* 47 (1975). Although "mere guess or conjecture is not sufficient," *Joseph v. Passaic Hospital*

Assn., 26 *N.J.*, 557 575 (1958), a preponderance of probabilities is a sufficient basis for a determination. The burden of persuasion may be sustained if "the evidence demonstrates the offered hypothesis as a rational inference. . ." *Id.* pp. 574-575. A review of the entire record, including the briefs and proposed findings of fact incorporated therein, persuades me that many of the facts are not materially in dispute or should not fairly be put in dispute. A more detailed discussion of the evidence and positions of the parties is rendered regarding the more litigated and significant issues. Some of the factual findings are, by necessity, quasi-legal in nature.

Based upon a review of the entire record, I **FIND** the following to be **FACTS**:

1. Prior to August 1, 1987, non-hazardous solid waste originating in Essex was disposed of in a landfill located in the Hackensack Meadowlands (Meadowlands), which landfill was operated by the Hackensack Meadowlands Development Commission (HMDC). In late 1985 and early 1986, the HMDC landfill was used by Essex, Bergen, Hudson, Passaic, and portions of Union Counties. Other northern New Jersey Counties, *i.e.* Somerset, Middlesex, and the remainder of Union, used the Edgeboro Landfill (Edgeboro) in Middlesex. Other counties, such as Warren and Hunterdon, were relying on out-of-State disposal facilities.

2. On May 2, 1983, Essex entered into an Amended Consent Agreement, in litigation instituted by the County against the HMDC involving Essex's right to utilize Meadowlands landfills, pursuant to which Essex agreed that such use would cease as of July 31, 1987. Essex did so in exchange for financial assistance from the DEP and the HMDC to construct a resource recovery project for County waste, *Newark v. Bd. of Chosen Freeholders*, 221 *N.J. Super.* 558, 562 (App. Div. 1987). At this time, it was expected that Essex's planned resource recovery facility would be operational on or about January 31, 1987.

3. Passaic County was required to cease disposing of waste at the HMDC landfill on December 1, 1987; and Bergen County, by March 1988.

4. In the mid-1980's, the State faced a critical shortage in solid waste capacity. Reflecting this situation, the County and Municipal Government Commission (CMGC) of the State Legislature reported in 1987 that the state was "... presently embroiled in a solid waste crisis. This has resulted from a shortage of landfills without sufficient alternative means of in-State disposal being available." (Ex. WMNJ-44, p. VIII). The report characterized the disposal of the State's waste as having "... reached crisis proportions. Within the next year, the State's four largest landfills are due to close without there being any long-term replacement facilities available for use by the counties." *Id.* p. X VII. The report also noted that although counties were required to adopt and implement ten-year plans for the management and disposal of solid waste, the majority had not done so "in full compliance" and would have to face "the resulting crisis." *Ibid.* The report identified four possible options for providing additional disposal capacity to meet a short-term crisis and focused upon two, transfer stations and out-of- State disposal, as offering the best temporary solutions. One recommendation of the CMGC was that the Commissioner of the State Department of Environmental Protection (DEP) be made the planner and implementor "of last resort" for solid waste disposal facilities in those instances in which counties were not progressing as far as they should in the planning and implementation of their solid waste plans. *Id.* p. 111.

5. A transfer station receives waste from collection vehicles and transfers it to larger trucks for delivery to out-of-State disposal sites. Transfer stations are facilities where collection trucks, usually of the packer type, are emptied into larger over-the-road vehicles having two to four times more carrying capacity. The larger vehicles

transfer their waste to distant out-of-State disposal sites. Long-haul may also be accomplished by rail.

6. As early as 1985, the DEP's planning staff had concluded that counties in northern New Jersey would be running out of in-State landfill capacity before plans for resource recovery facilities, or other long-term disposal capacity, would be implemented. The DEP's Commissioner ultimately selected transfer station programs to fill the gap. The details for implementing transfer station programs were developed by the DEP's Division of Solid Waste (DSW) under the direction of Wiley. At the times relevant to this proceeding, Wiley was employed with the Department's DSW. He was the Assistant Director for planning commencing in mid-1985 and was named Acting Deputy Director of the DSW in the summer of 1986. Wiley held this position until his resignation in the Spring of 1988. In his capacity as Acting Deputy Director, Wiley became involved with the DEP's transfer station program, which program was an interim response to the threat of closure of the HMDC Landfill and Edgeboro.

7. The various County Boards of Freeholders (Freeholders) and the HMDC are responsible for adopting and insuring implementation of a District Solid Waste Management Plan (District Plan). To be effective, an initial District Plan, or any amendment thereto, must be approved by the DEP and submitted to the Board for review and recommendations on economic aspects. Approved District Plans become part of the DEP's statewide Solid Waste Management Plan. A District Plan must identify the facilities and sites needed to insure proper management of waste generated in a county or the Meadowlands, as applicable. The County Freeholders and the HMDC may propose waste-flow directives requiring generators to dispose of waste at particular disposal facilities. To be effective, waste-flow proposals must be approved by the DEP in the District

Plan process and must be jointly adopted as waste-flow regulations by the Board and the DEP.

8. Implementation of County District Plans incorporating a transfer station program generally involves several steps. These include amendment of the District Plan by the Freeholders, approval of the amendment by the DEP, issuance of permits for construction by the DEP and under the local building codes, with review and approval by the Department of Community Affairs (DCA), and the issuance of other permits by the DEP. DEP review of a plan amendment can take many months; DEP's permitting processes can take as long as six months.

9. In late 1985, the DEP took the initiative to develop transfer station programs for inclusion in the District Plans of Morris, Somerset, Union, and Passaic Counties, counties which the DEP viewed as being resistant to planning alternative disposal. Warren, Hunterdon and Sussex Counties were at that time already implementing programs for out-of-State disposal. The DEP determined to amend the individual plans for those counties ". . . that were thought to be unwilling based on past history, to do anything on their own, to plan for alternative disposal." (Tr., Vol. 15, p. 12.) Amendment of the plans would allow transfer stations to be sited and arrangements to be made for construction of transfer stations and private operation of those facilities to obtain disposal agreements out-of-State. Although the DEP did not determine to take over the planning functions for Essex, ". . . it was certainly known at the end of 1985 and early in 1986 that Essex County had the same problem that the other counties had, and would have to find an alternative." *Id.* p. 13.

10. Beginning in January 1986, the DEP developed, with the aid of an engineering consultant, a Request for Proposals (RFP) to site, operate and construct transfer stations in Union, Passaic, Morris and Somerset Counties.

The RFP issued in draft form in May 1986. The DEP circulated the RFP to potential bidders and publicy advertised it. It also conducted a pre-bid meeting, attended by at least 50 individuals representing an unknown number of companies, not all located within New Jersey, in late May or early June 1986. The pre-bid meeting was open to all in the business who wished to attend. The DEP eventually formally issued the RFP and began receiving responses.

11. The RFP requested private sector operators to identify a site for inclusion in a county Solid Waste Management Plan; to identify the general nature of a transfer station operation that could handle waste for an entire county; to identify the environmental controls associated with the facility; to develop a transportation and disposal scheme for out-of-State facilities; and to identify potential costs of such arrangements for three- to five-year programs. The RFP required letters of intent for long-term disposal contracts to be followed by formal contracts upon election of a proposal. This requirement was included because of a judgment of the DEP Staff, including Wiley, that the DEP "was taking over a planning responsibility," "that this was a very serious responsibility," and that therefore disposal capacity was necessary to avoid ". . . subjecting those counties to tremendous uncertainty." *Id.* pp. 35-36. DEP personnel were not aware at that time of long-term contracts being used in the solid waste industry for the long-distance transfer of waste, incuding programs then existing in Hunterdon County in New Jersey and in Long Island, New York (Long Island), but were convinced that such a contarct was necessary for the program being implemented. The RFP allowed the bidder to assume that it could seek from the Board a franchise to be the exclusive county transporter of waste for out-of-State disposal. The RFP also indicated that the selected proposer and transfer station would receive the entire waste-flow for a county, but did not specify the tonnage. Estimates

of county waste-flow were not proveded until later in 1986.

13. Responses to the RFP were received sequentially in two-week intervals throughout August and September 1986. The DEP impaneled an evaluation team to review submissions, which team included a member of the Board's staff to assist in evaluating the credibility of cost estimates. Review of the submissions occurred from the Fall of 1986 through the Spring of 1987. By December 1987, the DEP had amended the District Plans of all four subject counties to include transfer station sites. From the drafting of the RFP to selection of proposals took approximately seven months.

14. The range of prices submitted in the Fall of 1986 in response to the RFP, for three and five-year programs, was from $70 per ton to $80 per ton, based upon assumptions stated in the RFP. Respondents assumed, among other things, an exclusive right to operate within a given county and the opportunity to apply to the Board for a franchise. The responses were cost estimates reflecting the fact that facilities were not completely defined, that construction requirements were not fully developed, and that contracts with landfills were not in place. All the prices eventually established were higher than those included in the RFP responses.

15. The RFP process received a substantial amount of media and public attention. This was especially so when the RFP process was initially announced and in the summer of 1986, when proposals began to be received and when sites were identified. Identified sites for transfer stations in the four counties in question, in particular, ". . . became the subject of a great deal of local controversy." *Id.* p. 40.

16. The DEP's staff did not initially envision that the RFP process would result in contracts between the counties and vendors, but that projects would be recognized as part of solid waste plans, allowing vendors to take

necessary steps to become public utilities. When the DEP published its RFP, it envisioned that waste-flow rules would be promulgated assigning waste to facilities in District Plans and that the assignment of waste-flows to an identified facility "would create sufficient opportunity for an entrepreneur to set up a business to handle the need, provide a service, receive compensation, and establish rates." The DEP later concluded that opportunities to individual entrepreneurs were dependent upon an individual vendor's ability to obtain financing. Some of the successful respondents to the RFP indicated that the concept of waste-flow directives was not sufficient and that contracts would be necessary. Such concerns were raised throughout the process, from the bid conference through informal responses and proposals. Several respondents indicated that financing for construction and transportation was unattainable in the absence of contracts. The DEP's staff eventually concluded that financing might not be attainable without some commitment by a county. This determination was in part based upon communications between DEP staff members and lending institutions. Ultimately, the counties were responsible for making decisions on what arrangements would be made with vendors. The DEP itself never became a party to any contracts, but encouraged county decision-making.

17. By June 1987, with implementation of a program encouraging transfer station operations, the DEP recognized that such programs would have higher costs than had been associated with prior in-State capacity because of higher tipping fees at out-of-State disposal facilities and increased transportation costs. The DEP sought, however, to avoid major disruptions in disposal facility access and the high costs associated with such disruption.

18. During the summer of 1986, Smith recommended to his superiors in the County that efforts be made to implement a transfer station operation in light of the

approaching deadline for vacation of the Meadowlands Landfill. He was instructed by his then superiors not to undertake such an effort because of their belief that the State would be willing to grant an extension of the July 31 deadline because of Essex's "greater progress than its neighboring counties in implementing solid waste management methods." (Tr., Vol. 27, p. 31.) Beginning in approximately late summer and early fall 1986, communications between the DEP and Essex personnel regarding the County's disposal situation became more frequent. This development reflected the August 1, 1987 deadline for Essex to discontinue using the HMDC landfill and efforts by the DEP to determine the status of the County's progress toward this goal. Communications during this time period with the DEP were with Wiley and Michael F. DeBonis (DeBonis), the then Director of the DEP's DSW. Wiley and his superior were involved in meetings and discussions with County representatives to monitor the situation in Essex. County representatives communicating with DEP personnel at that time included David Hull (Hull), the individual then in charge of the County's solid waste program. Hull was Smith's superior; his exact title cannot be determined from the record.

19. By this time, it was apparent that the resource recovery facility would not be operational by July 31, 1987 because of construction delays. Smith had communications with DeBonis and others within the DEP's DSW beginning in the late spring and summer of 1986, the thrust of which were whether the DEP would be willing to extend the closing date of the Meadowlands Landfill vis-a-vis Essex. Smith ultimately received a negative response to queries of DeBonis and others in the DEP's DSW as to whether directions they were receiving from their superiors "indicated an intention on the State's part to relax the deadline." (*Id.* p. 36). The DEP took the position that Essex had to find disposal capacity outside of the Meadowlands, and the County took the position that it was facing a hardship because of delays in

construction of the resource recovery facility. At that time, Essex did not ". . . really have a response as to how they would cease using the Meadowlands." (Tr., Vol. 15, p. 25.) County representatives attempted to persuade DEP personnel to make efforts to find a solution to the problem, which solution could have included amending the Consent Order deadline and agreeing to additional capacity in Meadowlands facilities while locating some other facilities for Essex's use. The County's position, until a change of administration in Essex which occurred in the Fall of 1986, was generally that the DEP and the HMDC should find more capacity to accommodate Essex because the County was proceeding in "good faith" to develop a resource recovery facility, *Id.* p. 156. The DEP's position was that it would not intervene to designate any other site in New Jersey to handle Essex's waste.

20. The DEP advised the County that it was willing to communicate with the HMDC regarding the latter's policies and technical information concerning the potential for extended use, but that it would not attempt to persuade the HMDC to change the deadline. DEP personnel did communicate with HMDC staff regarding the matter. In approximately the Fall of 1986, the HMDC indicated its unwillingness to allow continued disposal by Essex in the Meadowlands. These communications ultimately resulted in a determination by DEP personnel that there was no additional capacity available at the Meadowlands facilities. As a result, a formal letter from either the DEP Commissioner or an Assistant Commissioner was sent to the County Executive (Executive) in the Fall of 1986 asking for a specific plan for handling the impending closure of the Meadowlands landfill to Essex. Although not entirely clear from the record, it is reasonable to infer that this letter was either not responded to or was not responded to with a plan that was deemed acceptable to the DEP.

21. Smith was the Director of the County's DSW from March 1986 until the end of July 1987. The DSW is located within the Department of Planning and Economic Development (Planning and Economic Development).

22. There was a change in the County administration subsequent to the November 1986 elections. Meetings between representatives of the new administration and DEP personnel were conducted. Smith assumed the position of Coordinator for the County's solid waste program. Subsequently, there were communications between Wiley and Smith. Karpinsky was also involved in these communications, as were the Director of the DEP's DSW, a DEP Assistant Commissioner, and the DEP's Commissioner. These communications generally were directed to the County's "entire situation" in relation to the scheduled closure of the Meadowlands Landfill to Essex and alternatives (*Id*, p. 42).

23. Essex ultimately determined to develop and implement an emergency, interim transfer station program. The program was not intended to supplant capacity at the County's resource recovery facility, once that facility became operational.

24. Subsequent to the November 1986 elections, Nicholas Amato (Amato), the new Executive, requested that the Port Authority of New York and New Jersey (Port Authority) provide assistance to the County to help bring to fruition Essex's resource recovery facility, which was then being built on Blanchard Street in Newark. He requested the assignment of an individual knowledgeable in the area to assist the County in meeting its contractual responsibilities relating to the resource recovery project, specifically, to develop a plan for disposal of ash, among other things. As a result, Robert Karpinsky was assigned to the Essex resource recovery project in 1986 and 1987. His preliminary duties were to help with and complete the negotiations for the project and to bring it to a state of construction. The

Executive asked Karpinsky to also help with the County's transfer station program. Karpinsky's work on the transfer station project began in approximately January 1987. From approximately April 1987 until the end of July 1987, 40 to 50 percent of Karpinsky's time was spent on the transfer station project.

25. Karpinsky was a Senior Operations Analyst employed by the Port Authority from July 1985 through March 1988. Karpinsky has worked in the field of resource recovery for approximately 12 years and has been involved in the construction and start-up of approximately seven resource recovery plants throughout the United States. He has a B.S. degree in Management from the City University of New York and is currently pursuing a Master's Degree in Energy Management at New York University of Technology. He was also previously employed by Ogden Martin of Paramus, New Jersey, in which capacity he was involved with the procurement of more than two dozen products and services.

26. Essex subsequently issued what is referred to as a Solicitation of Interest. The Solicitation of Interest was patterned on the RFP, although not identical to it. In approximately May 1986, Smith attended, as an observer, meetings conducted by the DEP regarding efforts to procure transfer, transportation and out-of-State disposal services for Passaic, Morris, Somerset and Union Counties. Smith attended these meetings because he had concluded that although Essex had made more progress than those counties regarding a resource recovery program, the needs facing the County were similar to those pertinent to the DEP's targeted areas.

27. Smith's efforts in seeking to obtain transfer, transportation and disposal services for the County culminated in the issuance of the Solicitation of Interest. Smith drafted and circulated among the solid waste industry on December 10, 1986 a request for the development and submission to Essex of proposals for the establishment

of solid waste transfer stations, formally entitled "Solicitation of Interest in Having Transfer Stations Included in the Essex County Solid Waste Management Plan" (Solicitation of Interest) (Ex. WMNJ-2). The content of the Solicitation of Interest is as stated in Exhibit WMNJ-2.

28. The criteria reflected in the Solicitation of Interest, which criteria were developed by Smith and other County employees, were designed to facilitate permanent approval by the DEP and to mitigate, to the extent possible, any undesirable impacts of the transfer stations. The criteria pertaining to DEP permitting, more specifically, are reflected on pages 3-5 of Exhibit WMNJ-2. Though not as technical as the RFP, the Solicitation of Interest dealt with many of the same subject areas. The Solicitation of Interest requested, among other things, proof of expertise, financial capability, and commitment for adequate out-of-State disposal capacity at permitted, environmentally-sound landfills. DEP personnel, including Wiley, discussed with County staff members, including Smith, the content of the Solicitation of Interest prior to its issuance. Smith, in particular, spent a substantial amount of time inquiring of DEP personnel in what manner the DEP had developed its transfer station program and structured such program with some emphasis upon the fact that the DEP methodology was not a procurement process, as opposed to creating an opportunity for private entrepreneurs to go into business in the solid waste area, with assignment of a waste-flow. During this time, the County had not determined how it would structure its transfer station program.

29. Generally, a procurement program ultimately results in contracts between the parties, whereas the DEP's approach, broadly speaking, was a plan amendment process allowing respondents to take necessary steps to become public utilities. It was not initially envisioned

that the County's process would result in contracts between the County and vendors.

30. The Solicitation of Interest estimated that 2,500 tons per day of transfer station capacity would be needed. This estimate was based upon Essex's experience with disposal at the Meadowlands Landfill. It was a reasonable estimate.

31. Approximately 100 solicitations were mailed. The Solicitation of Interest was advertised in several trade journals within the waste management industry, as well as in *The Star-Ledger*.

32. The initial deadline for responses to the Solicitation of interest was February 27, 1987. Nine responses were received. Some of the proposed sites were subsequently deemed by Essex DSW personnel to be "problematic" from the perspective of the Environmental Cleanup Responsibility Act (ECRA), N.J.S.A. 13: 1k-6 *et seq.*, and proposers were permitted to substitute sites that would be more "suitable." (Ex. P-SWTR-1, P-9, p. 5.). Several of the responses consisted of cover letters expressing a general interest in assisting the County with its transfer station project. Of the nine proposals received, only four indicated specific sites for a transfer station. These responses were from Solid Waste Transfer, Ellesor of Essex, inc. (Ellesor), Naporano Iron & Metal Co (Naporano), and Accent Investments, Inc. (Accent) (also known as Scugozza). The Avenue A and Avenue F sites were not among those initially proposed.

33. Karpinsky ultimately visited most of the sites identified in the responses several time. He went with Smith as well as Newark's Mayor, the County Freeholders, and the Executive.

34. WMNJ is a wholly-owned subsidiary of Waste Management, Inc. (WMI), a New York Stock Exchange-listed company, WMNJ is incorporated in the State of New Jersey, having filed a Certificate of Incorporation

in July 1984. WMNJ's initial name was Waste Transfer Systems, Inc. The name was changed to WMNJ in October 1986. Waste Management of Pennsylvania (WMPA) is a wholly-owned subsidiary of WMI.

35. WMNJ's response to the Solicitation of Interest is as stated in Exhibit N-38, K. WMNJ's initial response consisted of a detailed letter stating that it had available disposal capacity and was looking for a specific site, indicating that WMNJ was continuing to work on a proposal, had a site in Pennsylvania for the deposit of waste and was attempting to put together a plan for a transfer station in Essex. WMNJ's response also noted the extensive expertise of WMI as one of the world's largest solid waste service companies. WMNJ, more specifically, noted that WMI, through its various subsidiaries, services more than three million customers throughout the world, has experience in all aspects of solid and chemical waste, is the world's largest service company in its field, and was under contract with the HMDC to operate a baling plant and balefill processing 7,000 tons per day, as well as operated nine companies in New Jersey involved in the collection, transportation, processing and disposal of solid waste. The response also noted that WMI operates 23 transfer stations nationwide, processing 3,340,000 tons annually, and operates 110 approved and permitted sanitary landfills. WMNJ'sinitial proposal contemplated a rail and bale operation, construction on a non-emergency basis, and the processing of an average of 2,000 tons of waste daily over a three-year period. Noting that the proposal involved a multi-million dollar investment in property, structures and equipment, WMNJ indicated that its offer was contingent upon and subject to adoption of waste-flow directives, a put-or-pay guaranty in rates, receipt of all necessary approvals and permits up-front, and a franchise to protect its investment.

36. Solid Waste Transfer's initial response to the Solicitation of Interest is as stated in Exhibit P-SWTR-1, P-3.

Solid Waste Transfer's initial response incorporated three sites. These were a site on Hill Street in Orange, New Jersey, known as the Reingold site; a site on Evergreen Avenue in Newark, New Jersey; and a site on McClellan Street in Newark, New Jersey, known as the Orbis site. The initial response contemplated a rail and bale operation and proposed facilities with sufficient capacity to take all County waste. The response stated that Solid Waste Transfer would lease the three referenced facilities under net net leases, would contract for the operation of each facility over the term of the contract, and would supply all administrative functions internally. The response also indicated that transportation and disposal of the County's waste in the State of Pennsylvania (Pennsylvania) would be through an agreement with Chambers Development Co., Inc. (Chambers Development), pursuant to and incorporated in a Letter of Intent and agreements to be executed reflecting an agreement in principal which had already been executed between Solid Waste Transfer and Chambers Development.

37. The Orbis site was rejected by the County and the DEP because of potential ECRA problems. The Evergreen site was unsatisfactory because of traffic considerations. The Reingold site was unsatisfactory because it could not be simultaneously used for operations while a permanent plant was under construction. It was clear to County personnel, at this point in time, that if a facility were to be constructed, it would have to be done on an emergency basis and have the potential for becoming operational in the absence of a completed building.

38. Some of the respondents were eliminated right at the beginning, primarily those submitting only letters of intent, while others showed interest up to a week before the final site selection. These included Naporano, Cid Landfill (Cid) in Buffalo, New York, and SCU. SCU could not get a firm commitment for landfill space, Cid did not have a transfer station site, and Naporano did not have a landfill. Cid had a landfill with a satisfactory

collection system and had dedicated capacity sufficient for the County's requirements. It also had a transportation system to transport waste from Essex to the landfill. However, it never incorporated a site for a transfer station in its proposal. Cid unsuccessfully proposed negotiating with the HMDC to establish a transfer station in the Meadowlands. Cid wanted to present a total package consisting of a transfer station, haulage and disposal, not just sell landfill space, with other entities performing the other functions. Karpinsky, at one point, suggested that Cid investigate working with Naporano, which did have a transfer station site. Negotiations to that end never proved successful, however. Although Naporano had a transfer station site, it never had a landfill for disposing of the ash from the County's resource recovery facility.

39. Essex conducted an extensive review of the proposals in February and March 1987. Karpinsky and Smith conducted a review of the responses to the initial Solicitation of Interest based upon a weighted average system that had been developed by Smith. The rating sheets used by Smith and Karpinsky to evaluate the initial responses are as stated in Exhibits PSWTR-6 and PSWTR-7, respectively. The figures contained under the column headed "scoring weights" on the rating sheets represent the highest point total which could be awarded for each criterion. The scoring weights for each criterion are as stated in Exhibits P-SWTR-6 and 7. The weights were developed by Smith and were set from zero to two. The effect of this system was to establish a weighted average.

40. The rating sheets were divided into four general categories, general criteria, transfer facilities, transportation, and landfill, with subcomponents for each. WMNJ pertains to column 4; and Solid Waste Transfer, to column 5.

41. The general criteria category reflected the ability to transfer waste, *i.e.*, the haulage method proposed.

Karpinsky was specifically interested in rail haulage in this respect and, if not rail haulage, the proximity of a good interstate highway system to the proposed site. The general criteria category also included a final disposal subcomponent, which criteria related to how well the landfill site was managed, specifically, whether or not it was a well-managed landfill with leachate collection and treatment.

42. The category of transfer facilities required conformance with site specific criteria, as those are indicated on Exhibits P-SWTR6 and 7. For example, one factor was whether there would be scales which would conform to DEP requirements. Indoor operations pertained to the control of any leachate or rainfall on any waste which would have to be stored overnight. Storage of containers pertained to whether containers would be left in streets or whether there was adequate space on site to line up and store containers for the eventual long-haul arrangement. Drainage arrangements pertained to whether or not the proposer would be able to interconnect to a sewer system and whether there were holding tanks. Scugozzi, for example, was ranked highly by Karpinsky regarding transfer facilities; however, not at a maximum level because the proposed site was locate at a shoreline of the Passaic River; more specifically, it was only four feet above the high-water mark, making it subject to flooding. Host community category pertained to any perceived opposition to a proposed site.

43. The transportation category pertained to the proposal for routing garbage from the transfer station to the final disposal site.

44. The landfill category pertained to dedicated capacity, as well as permits.

45. In developing the rating system, Smith was especially concerned with having assurances not only of out-of-State capacity but of properly run facilities. Smith also developed the rating criteria in an effort to insure and

facilitate the DEP's approval. It was his belief at the time that the DEP was equally concerned about the integrity as well as the availability of ultimate disposal sites. Smith's conclusions regarding the DEP requirements were in part based upon his knowledge of the RFP process and his knowledge that the DEP was in communication with environmental regulatory agencies in destination states in an effort to determine whether or not disposal sites met environmental criteria, whether they met permit requirements, and whether or not they would likely have adequate capacity.

46. Kapinsky and Smith performed their review without input from others and independently of each other. They discussed the results when they were completed. Karpinsky visited those sites which pertained to specific proposals; he ultimately visited most of the sites several times. He went with Smith as well as Newark's Mayor, the County Freeholders, and the Executive.

47. Karpinsky reviewed the responses to the Solicitation of Interest and rated them with respect to their responsiveness to the criteria incorporated in the rating sheets on a scale from zero to two. Firms that scored a zero in all criteria merely expressed an interest in the transfer station program without further detail at that time. Although the ratings were in whole numbers, Karpinsky gave some responses a half-point. For example, Karpinsky had knowledge that Newark opposed all sites and if one site were already located within Newark, Karpinsky gave it a half point if it were in the Ironbound section. This determination was reflected on line 12 under transfer facilities, host municipality.

49. Proposals which consisted only of letters regarding each category and sub-components were rated zero in all aspects by Karpinsky. The ratings by him essentially evaluated the certainty as well as the content of the responses. For example, Karpinsky rated Naporano with a one regarding total disposal costs because at the time,

Naporano did not have firm landfill commitments and could not finalize its total price.

50. Karpinsky rated Scugozzi's proposal with a zero for host municipality because it was located on Blanchard Street, the location of the proposed resource recovery facility, and Karpinsky believed there was major opposition to a transfer station there. Karpinsky rated Scuggozi's transportation proposal with a one because the proposal required track extensions and interfacing with Conrail, which he characterized as a difficult proposition based upon his experience with the resource recovery plan. Scugozzi proposed a committed capacity of three to four hundred tons and a total thousand tons per day, with no definite confirmation of any expansion plans or approval from local regulatory agencies regarding the balance. Karpinsky therefore rated this proposal with a one and one-half landfill capacity.

51. In order to be rated a two on total disposal costs, Karpinsky required that a proposer come in at least $10.00 per ton less than what he knew to be the prevailing rate in Long Island. Although there was at least a $10.00 spread between proposers that Karpinsky rated two for total disposal costs, he rated each a two if they were at least $10.00 below the prevailing rate. These included Scuggozi, Solid Waste Transfer, Ellesor and Cid. Karpinsky awarded two points to all proposals for total disposal costs, with the exception of Naporano, which did not have a firm landfill commitment and could not finalize its price.

52. Although WMNJ did not initially "typically" propose a site, Karpinsky gave WMNJ a good score on landfill commitments, a two, because ". . . knowing them, they were the largest in the country and they had the most landfills." (Tr., Vol. 13, p. 54.)

53. Solid Waste Transfer's initial proposed price was sufficiently explicitly indicated so that it could be evaluated,

and it was deemed to be reasonable when compared to the prevailing market price.

54. Karpinsky assigned total scores ranging from zero to twenty-three and one-half, assigning the top score to Solid Waste Transfer and a score of six to WMNJ.

55. Smith assigned total scores ranging from zero to 25. He assigned the highest score to Solid Waste Transfer and a score of zero to WMNJ.

56. After preparing his report, Karpinsky reviewed the proposal evaluations prepared by Smith. Both Smith and Karpinsky agreed on the top three proposals, Scugozzi, Solid Waste Transfer and Ellesor, and that Solid Waste Transfer offered the best initial proposal.

57. The rating sheets developed by Smith were reasonable and sufficient for evaluating the technical and economic aspects of the responses to the Solicitation of Interest. Karpinsky's and Smith's assignments of scores to each of the responses, although somewhat subjective, was consistent and done in a reasonable, fair manner with no apparent favoritism.

58. Because of the identification by the County and the DEP of environmentally-related problems and other shortcomings, Essex asked the vendors to supplement their proposals with better sites. Smith communicated by telephone with WMNJ personnel after the first submissions, requesting more details. A response was eventually provided in the form of a more detailed proposal. Solid Waste Transfer subsequently proposed the Avenue F site; and WMNJ, the Avenue A site, which sites were ultimately approved.

59. Karpinsky and Smith subsequently evaluated the sites proposed on the supplemental responses for all items on column 5 through 12 on the rating sheets, although nothing was ever written down as a more formal evaluation.

60. During this general time period, Smith asked Wiley for technical assistance, more specifically, for assistance regarding specifications for construction of transfer stations. The DEP provided Smith with a copy of all applicable regulations concerning its technical requirements for transfer stations, as well as a copy of the DEP's RFP. The County also sought input on site evaluation regarding the sites that were submitted in response to the Solicitation of Interest. Smith was specifically concerned about whether enough space would be available at the sites to build a transfer station and to handle the waste involved. Although DEP personnel did not formally rank the proposed transfer station sites in terms of suitability, DEP staff did provide informal evaluations, both verbal and written, regarding the proposals. The DEP did not provide any assistance to the County specifically in the selection of vendors; however, DEP personnel did, at Essex's request, review information about sites that were proposed. More specifically, the DEP reviewed information regarding the environmental feasibility of sites being developed as transfer stations for the varying amounts of waste that were proposed. One aspect of environmental considerations which was stressed was traffic, which is generally a major consideration regarding transfer stations. It was more so in this case because all proposals identified sites in Newark. The condition of the sites themselves in terms of what was then on the land was another important factor in many instances. It was assumed that land already in use would be subject to an ECRA review for a property transaction to occur; various other permits might also be needed, ranging from flood plain to stream encroachment permits. In this respect, Wiley had direct contact with Smith and Karpinsky. A number of individuals on Wiley's Staff also worked on the matter in the spring of 1987, in particular, Miguel Garces (Garces), who coordinated on a daily basis with the County. Garces conducted some of the site reviews. The information developed by DEP staff, including by

Garces, was conveyed to the County, both formally and informally.

61. Although, initially, the selection process focused on the technical side of the proposals, price was one of a number of important considerations in the ultimate award of the contracts in question. This area was largely not handled by Smith. Karpinsky, initially, emphasized technical considerations, such as insuring that the proposed transfer stations, landfills, and transportation systems proposed were acceptable and adequate.

62. However, price was extremely important to Amato because of the "rate shock" that would result when disposal by the County in the Meadowlands ended. At the time, the costs Essex of disposal in the Meadowlands Landfill was approximately $35 per ton.

63. In its initial proposal to Essex, WMNJ proposed a total service fee of $75.85, which reflected a rail and bale operation. The total service fee initially proposed by Solid Waste Transfer and Recycling was $91.60 per ton.

64. Although not focusing on price, Karpinsky was convinced that the prices proposed by Solid Waste Transfer and WMNJ were reasonable in light of comparable costs in the metropolitan area. Karpinsky reviewed in relation to price negotiations, some of the estimates on construction costs, transportation routing, distances, etc., which reinforced his view that the pricing seemed fair and reasonable, which analysis was pertinent to the evaluation of component costs of the vendors' proposals.

65. Smith, in evaluating the responses, placed a high emphasis upon the fact that he believed the County was in an emergency situation and had to insure that garbage did not accumulate in the streets as of August 1, 1987. Price considerations were focused upon more at a subsequent time and by different individuals. However, during his evaluation of the responses, Smith concluded

that the prices indicated in the responses were at or below the prevailing market and, in particular, were reasonable when compared to what was then being paid by communities in Long Island for services under contract with a specified time duration, as opposed to spot transactions, "which were often conducted through illegal transfer stations." (Tr., Vol. 27, p. 84). To be acceptable to Smith, a proposed price had to be within what he, as well as other individuals, believed to be the then-prevailing market rate. Smith was persuaded that the prices submitted by WMNJ and Solid Waste Transfer were reasonable for the services being recommended, that is, reliable and proper service.

66. Cost estimates were compared with existing long-haul rates experienced at the time on Long Island. Karpinsky, in particular, had personal knowledge of such rates based upon his experience. In 1987, the Town of Hempstead (Hempstead), Long island, was paying Browning Ferris Industries (BFI) approximately $117 per ton for long-haulage pursuant to contracts, the first long-haul contracts on Long Island. In 1982, when its contracts were first executed, Hempstead was paying BFI $85 per ton. In 1986, the Town of Oyster Bay (Oyster Bay) signed a contract for long-haulage reflecting $106 per ton. The identity of the vendor is not entirely clear from the record, although it is reasonable to infer that it was WMI. In late 1986 or early 1987, the Town of Huntington (Huntington), Long Island, issued an RFP for long-haulage service. The low bid was $125 per ton, which bid was rejected. Huntington kept its landfill open and, as of January 1990, was in litigation with the State of New York regarding the matter.

67. Karpinsky ranked the responses to the Solicitation of Interest in comparison to his knowledge of prevailing prices to similar projects in the New York metropolitan area. Karpinsky assumed for comparison purposes that it would cost $8 to $10 more per ton to transport garbage from Long Island than from Newark, reflecting

additional distance, tolls and "just the hassle of going through New York City." (Tr., Vol. 13, P. 49). This cost differential was not related to labor rate differentials. Truckers generally work on a cost per ton basis. Karpinsky discussed the differential with Smith, who concurred that it was a reasonable estimate. This assumed differential, was, in fact, reasonable.

68. Although Karpinsky had no direct knowledge in January 1987 of long-haul rates in New Jersey, he subsequently acquired knowledge during the summer of 1987 that rates ranged between $65 and $125 per ton.

69. The rating sheets were subsequently conveyed by Smith to the Executive and his Chief of Staff, John Aloti (Aloti), for discussions regarding the proposal initially focussed upon. In the Spring of 1987, discussions and recommendations were conducted and made by Smith, Karpinsky, DEP staff, and the consultant to the Executive, William F. Cosulich Associates, P.C. (Cosulich). Discussions and recommendations were also conducted and made during this time period by the consultant to the County Freeholders, Kupper Associates (Kupper).

70. Based upon a review and site inspections, which review focused upon responses to the Solicitation of Interest which indicated specific sites for the transfer station, Cosulich issued a report dated April 1, 1987. This report was prepared at the request of the Executive. The content of the report is as stated in Exhibit P-SWTR-4-. Noting that the proposals in total reflected a capacity substantially in excess of the County's current and foreseeable future needs, Cosulich recommended that Essex consider only the most feasible ones. Cosulich, recommended continued consideration of nine sites, including Solid Waste Transfer's proposed sites on Evergreen and McClellan Avenues in Newark and on Hill Street in Orange. Each of the recommendations contained a notation that the sites should be continued to be considered as feasible provided certain drawbacks were adequately

addressed. The report also recommended that Accent's proposed site at 170-180 Frelinghuysen Avenue in Newark not be given further consideration because of a potentially significant DEP permitting requirement. Cosulich made the same recommendation regarding Accent's proposed site at 171-185 Blanchard Street in Newark because of extensive work, off- and on-site, which would be required.

71. Smith and an employee of Cosulich visited two sites on April 24, 1987, which sites were being considered for use as County transfer stations. These were located at 444 Frelinghuysen Avenue and at 100 Avenue A. Based upon this inspection, Cosulich issued to Smith, on April 24, 1987, a written appraisal of the sites. The content of this report is as stated in Exhibit P-SWTR-5. This appraisal was a supplemental site evaluation performed because all the original sites, with the exception of the Orange site, were not suitable. Although each site had shortcomings, they were deemed to be acceptable for a transfer station, with overall excellent ratings. Although the Avenue A site was smaller and had poorer local street access, it was deemed to have a better buffer zone setting it off from the surrounding area. The report noted that the structure existing on that site could be quickly adapted for use as a transfer station. There was also a rail siding on this site. The Frelinghuysen Avenue site was noted to be larger and with better access, but having existing structures which would have to be razed. The report noted in this respect that none of the structures in their present configuration were suitable for efficient transfer station operations. The Frelinghuysen site also was deemed to have excellent roadway and highway access, with a rail siding on the site, but with a possibility of truck queuing on Frelinghuysen Avenue.

72.. A public hearing was conducted on April 29, 1987 regarding the County's solid waste management plan. At this meeting, the Freeholders requested that Kupper perform a review of all nine proposed solid waste transfer

sites under consideration for interim disposal. All responses were discussed at that time, even brief, one-paragraph responses. Amato made the presentation to the Freeholder Caucus meeting on behalf of the County. Vendors were also requested to make informational presentations at this meeting. M. Mauriello made a presentation on behalf of Solid Waste Transfer, and a representative from WMI made a presentation on behalf of WMNJ. The Executive provided detailed information regarding the responses.

73. In preparation for the review, Martin M. Lund, Jr., (Lund), an employee of Kupper at that time, accompanied by Wiley and an Essex employee, conducted a site inspection of each of the nine sites on May 4, 1987.

74. A written report was issued to the Freeholders by Kupper on May 5, 1987. The content of this report is as stated in Exhibit P-SWTR-3. As requested by the Freeholders, Kupper's report was limited to consideration of the potential for packer queuing problems, proximity or lack thereof to major roadways, and the ability for adaptation of existing structures, or the demolishment of existing structures, in a timely fashion to have a transfer station operational by August 1, 1987. The report recommended that a detailed review of other relevant areas, including transportation and environmental constraints analyses, be performed at a subsequent time when a shorter list of proposed transfer sites was developed. Based upon its initial review, Kupper concluded that the most favorable potential sites were two sites proposed by Naporano on Doremus Avenue in Newark, the Solid Waste Transfer site on Hill Street in Orange, WMNJ's site on Hill Street in Orange, and WMNJ's site at 100 Avenue A in Newark. Those not recommended were Solid Waste Transfer's Evergreen Avenue, Newark, site; Solid Waste Transfer's, McClellan Street, Newark, site; Solid Waste Transfer's 442-4 Frelinghuysen Avenue, Newark, site; Ellesor's East Orange site, and Accent's 170-180 Frelinghuysen Avenue site.

75. During this general period, January 1987 through April 1987, the selection process was a continuous one, with informal and formal discussions and communications occurring on almost a daily basis. The participants in these communications included Karpinsky and Smith, as well as the Executive himself. Other participants were H. Curtis Meanor and Norman Schulaner, County Counsel. During this time, public meetings were also conducted to discuss the scope of the project with the State, specifically, the DEP, and Newark. In the latter respect, presentations were made to the Newark City Counsel. Certain of the proposals were also discussed, by Karpinsky and other individuals, with representatives of the City of Orange. Communications regarding the Orange site were conducted between the Executive's office and the Mayor of Orange's office.

76. Karpinsky previously arranged for aerial photographs of most of the sites for presentation to the Newark City Counsel. These photographs were also presented to the Freeholders at various informational meetings. A formal meeting of the Freeholders was subsequently conducted at which the three sites which had been then chosen by the Executive were presented by the Executive as recommendations. These sites were WMNJ's Avenue A site, Newark, and Solid Waste Transfers two sites, one at Avenue F in Newark and the other on Hill Street in Orange.

77. There were also numerous conversations during this time-frame between the Executive's Chief of Staff and the DEP's Deputy Commissioner regarding costs of the County transfer station program and the DEP's involvement in the RFP process.

78. Price negotiations commenced in approximately April or May 1987. The Executive wanted Cosulich to complete its review before negotiations started. The Executive was also concerned at this time with preventing a situation where garbage piled up in the streets. It is

reasonable to conclude, however, that the perceived urgency of the situation did not outweigh price considerations. As found, the County budget had been a major issue in Amato's campaign, and the Executive was very concerned about price. Several of the negotiation sessions were in-person meetings, conducted at the County Hall of Records, and many of the negotiations and clarification of points were conducted by telephone. Most of the negotiations were handled by County Counsel's office especially by Meanor and Schulaner, although Karpinsky was present for several of the in-person sessions. Smith was preparing to leave the employ of the County at the time negotiations were in full force. M. Mauriello and Michael Riccardelli, counsel for Solid Waste Transfer, conducted negotiations on its behalf; Theodore Schwartz, counsel, and an individual by the name of Amy Burbot conducted negotiations for WMNJ. Karpinsky had some input into the price negotiations. He reviewed estimates on construction costs and transportation routing, based upon distance and other considerations, and again concluded that the price proposals were fair and reasonable. Hull was not involved in the selection process of the transfer stations. His last involvement in the process was in mid-December 1986, when he gave Smith the authority to issue the Solicitation of Interest. Because of the importance attributed to the solid waste transfer program, Amato essentially had direct control over the County's DSW.

80. Once a vendor is selected, the usual DEP procedures for initiation of a transfer station service involves several steps. These include (1) Amendment of the county's Solid Waste Management Plan if the site selected was not previously incorporated therein; and such amendment requires publication of notice and public hearing, (2) Approval by the DEP of the amendment, (3) Issuance of permits for construction and operation, and (4) Issuance of other construction permits under the jurisdiction of the DCA and local regulatory authorities. The

entire procedure is somewhat lengthy. Amendment by a county can take two to three months. The DEP typically takes nearly all of a 15-day period it is allowed to approve a county's amendment. This is so because of statutory requirements regarding inter-agency consultation. The time-frame can be shortened by emergency declaration which allows the DEP to take any reasonable action to meet the statutory requirements in a minimum time period. The DEP's RFP process, from outset until transfer stations were operational, took approximately two years. As a result, the summer 1987 closure date for Edgeboro had to be extended.

81. The normal permitting process requires a complete engineering design prior to the issuance of a permit. Also required are complete final documents regarding environmental impact prior to issuance of any approval for construction. Such procedure takes a minimum of six months. An accelerated permitting process already in existence at this time was used by the DEP for landfill construction in an expedited time-frame, which expedited procedure results in a temporary Certificate of Authority. Such a procedure applied to the transfer station sites in question would only have met the need for an accelerated solid waste facility permit, not other permits which would have been required prior to construction, such as a stream encroachment permit, ECRA clearances, DCA approval for a building permit, any needed New Jersey Pollution Discharge Elimination System (NJPDES) permits, any air discharge permits, etc. Each such permit requires a complete application prior to issuance. The solid waste permit, in addition, requires a public hearing prior to issuance. A third approach, the declaration of an emergency, allows for the suspension of rules and for construction prior to issuance of permits.

82. The DEP took emergency action regarding the County transfer station program because of the necessity that the transfer stations be operable by August 1, 1987. The

general applicable rules were suspended upon the declaration of an emergency by the Governor, which allowed the DEP to adopt an emergency rule whereby a Master Performance Permit (MPP) could be issued immediately. The option eventually selected by the DEP was similar to the suspension of rules, but it was developed as a permit, pursuant to the Solid Waste Management Act, *N.J.S.A.* 13: 1E-1 *et seq.*, and it was designated as an MPP, which was adopted as an emergency rule, with a prerequisite declaration of emergency by the Governor. The process superseded issuance of a permit for construction, encompassing all requirements of the Solid Waste Management Act, as well as several other statutory or other requirements pertaining to permits, but not DCA requirements.

83. On April 29, 1987, by emergency rule making procedures, the Commissioner of the DEP (Commissioner) adopted an amendment to *N.J.A.C.* 7:26-1.7, authorizing the temporary exemption of solid waste transfer station facilities from the registration and engineering design approval requirements of the Solid Waste Management Act.

84. By ordinance adopted May 13, 1977, the Essex Freeholders proposed adoption of an amendment to the County's District Plan to include the three sites recommended by the Executive for interim transfer stations. The amendment also proposed waste-flows to the transfer stations to be received until the County's resource recovery facility came on line. The ordinance contemplated 1,540 total tons per day to the Avenue A Transfer Station, 1,368 of which would be Type 10; and 172, Type 13. It contemplated a total of 1,787 daily tons to the Avenue F Transfer Station, 128 of Type 10, and 1,659 of Type 13.

84. These three transfer station sites were subsequently selected and approved by County Ordinance 0-87-009, enacted on June 3, 1987, placing them in the County's

Waste Management Plan. The Plan Amendment was drafted by Smith and Schulaner and reviewed by Karpinsky.

86. The County's selection of the three transfer stations was approved by the DEP on June 8, 1987 in a Certification of the County's June 3, 1987 Amendment to the County's District Plan. In the Certification, the DEP found that the Plan amendment was consistent with the Statewide Solid Waste Management Plan. The Certification noted that the DEP's DSW had circulated the plan amendment to 16 review agencies for review and recommendations, including the Board and the Department of the Public Advocate. The Board did not object to the Plan Amendment, and the Department of the Public Advocate did not respond to the DEP's request for comments. The Certification modified and approved proposed waste-flows. Essex generated non-hazardous waste was routed from specific towns to designated transfer station sites.

87. On June 18, 1987, the Commissioner issued a Statement of Imminent Peril to public health, safety and welfare mandating adoption of a new rule at *N.J.A.C.* 7:26-1.10 by emergency proceedings. He noted in that statement that the transfer station temporary exemption provision reflected in the April 29, 1987 emergency rulemaking procedures could not fully address the imminent crisis in Essex, emphasizing that the ". . . construction of the selected transfer station facilities and the ordering of equipment must be undertaken immediately to meet the July 31, 1987 deadline." (Ex. P-SWTR-1, P-8, p. 2). The thrust of the rule was to streamline the process for obtaining several of the permits required for transfer stations prior to the commencement of development. The Commissioner noted that in the absence of such action, "a regional solid waste disposal crisis" and "a public health emergency" were developing. The June 18, 1987 statement reflected a streamlined MPP process which adopted, by emergency procedures, a new rule

authorizing the immediate issuance of MPPs to transfer station facilities satisfying the requisites of the Solid Waste Management Act, the Water Pollution Control Act, *N.J.S.A.* 58:10A-1 *et seq.*, the Flood Hazard Area Control Act, *N.J.S.A.* 58:16A-50 *et seq.*, and the Air Pollution Control Act, *N.J.S.A.* 26:2C-1 *et seq.*

88. On June 23, 1987, the Commissioner published a notification of readoption of the emergency rule in question.

89. On June 28, 1987, then Governor Thomas H. Kean issued a Certificate of Imminent Peril, concurring with the findings of the DEP's proposal of an Emergency New Rule Adoption. The Governor's Certification of Imminent Peril referenced the Statement of Imminent Peril incorporated in the DEP's Emergency New Rule Adoption.

90. The DEP issued an MPP to Solid Waste Transfer on June 30, 1987. The content of this document is as stated in Exhibit P-WSTR-1, p. 10.

91. One finding articulated in Solid Waste Transfer's MPP is as follows:

> Based on the permittee's demonstrated reliability, expertise and competence in solid waste collection, and based on the permittee's proposal which demonstrated an adequate understanding of the technical, financial and operational needs of the Transfer Station project and evidenced the permittee's ability to obtain financing and licensed disposal capacity, the permittee is likely to exhibit reliability, expertise and competence in operating the Transfer Station facility. This finding is preliminary and made

subject to the provisions of Permit Condition No. 28[4] (Ex. P-SWTR-1, P-10, p. 2).

92. Solid Waste Transfer was required to be prepared to commence handling 1,800 tons per day on August 1, 1987, 2,100 tons per day on August 7, 1987, 2,300 tons per day on August 12, 1987, and 2,600 tons per day by August 17, 1987.

93. Solid Waste Transfer's MPP was conceptually designed to allow the vendor to complete design plans for features that were to be constructed prior to operation of the transfer station facility and submit the plans for them to the DEP for approval. Upon approval, construction of approved features could begin before approvals were in place for other aspects of construction. Construction plans evolved over time, even after operations commenced.

94. At the time the County's Solicitation of Interest issued, contractual agreements were not contemplated. The subject developed much later during the course of the review process of the County.

95. After the transfer station sites were approved in the County's Solid Waste Management Plan, contracts were negotiated between the County and WMNJ and Essex and Solid Waste Transfer providing for the operation of the facilities under a franchise to be obtained by Essex and subject to Board-approved tariff rates to be applied for by the County.

96. The Executive wanted Cosulich to complete its review before negotiations commenced. Communications and discussions regarding contracts commenced in early June 1987. As of then, and prior to that time, litigation was pending regarding the August 1, 1987 closure date

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[4] Condition No. 28 was satisfactory completion of any investigative report pursuant to *N.J.S.A.* 13:1E-126 *et seq.*

of the Meadowlands landfill. Newark was a participant in the litigation, which was commenced to prevent closure of the landfill. This litigation was extremely active during May and June of 1987, resulting in a general atmosphere of uncertainty. The prospective vendors were concerned regarding the risk of investing time, effort and money in developing a project that might not come to fruition, and the County was uncertain as to whether it would have available a place for disposal on August 1. Lawsuits and appeals continued throughout the period of negotiation. Contracts were intended to address the risks and uncertainties.

97. When contract negotiations commenced, they were intensive. In general, Essex negotiated concurrently with Solid Waste Transfer and WMNJ, *i.e.*, ". . . with both vendors not in the same room at the same time but negotiations with Solid Waste Transfer and Waste Management maybe back-to-back or day-after-day. . ." (Tr., Vol. 13, pp. 43-44). Negotiations were conducted in-person, many of which were attended by Karpinsky, as well as by telephone communications. Most of the negotiations were conducted on behalf of Essex by the County Counsel's office. Smith played a role more in the nature of consultation at this time as he was planning on leaving Essex's employ. Riccardelli and M. Mauriello conducted negotiations for Solid Waste Transfer. Amy Burbot and Theodore Schwartz conducted negotiations on behalf of WMNJ.

98. The "legal aspects" of the documents were basically negotiated exactly the same for both contracts ultimately executed. (*Id.* p. 44.) These aspects, including indemnifications, were handled by the Executive, who also made the final decision regarding pricing. As found hereinabove, Karpinsky was involved with more routine, technical matters. Negotiations also addressed provisions to be included in the contracts regarding the possibility that the County might still be allowed to use the Meadowlands landfill subsequent to construction of

the transfer stations. Both vendors asked for indemnification provisions to cover out-of-pocket expenses ". . . in case everything fell through at the last minute." *Id.* p. 45. The determination on this issue was made by the Executive, who concluded that it was reasonable and agreed to include indemnification provisions in the contracts.

99. Price was negotiated on behalf of the County by counsel for Essex, with personal participation by the Executive himself. At the "12th hour," just before the proposed contracts went before the Freeholders for approval, the Executive personally became involved in the negotiations to finalize the price. *Id.* p. 47. The contracts at that point did not have a common price. One of the major concerns of the Executive was to have the same price apply at both transfer stations to Type 10 waste, household waste, in order to avoid the appearance of discrimination in rates among Essex municipalities. This meeting was conducted on approximately the day the contracts were signed. On this day, representatives of Solid Waste Transfer and WMNJ were present at the Hall of Records in Newark and were involved in negotiations, separately and in separate rooms, with the Executive. As a result of these negotiations and the direct intervention of the Executive, the vendor with the higher priced proposal agreed to lower its price so that the ultimate contracts reflected the same rates. At least to Solid Waste Transfer, the County presented a stance of ". . . negotiating one vendor against the other" and advancing a "final offer on the price." (Ex. P-SWTR-1, p. 12.) This price is reflected in the contracts.

100. As regards Solid Waste Transfer, the County required, at the time a contract would be executed, that Solid Waste Transfer have in place an executed agreement, lease, regarding the land on which Solid Waste Transfer proposed to build the transfer station, that an agreement be executed with the landfill to which Solid Waste Transfer proposed to take Essex's waste, and that Solid

Waste Transfer keep the second site selected by Essex, the Orange site, available for construction of a permanent transfer station. The final plan accepted by Essex and approved by the DEP was for Solid Waste Transfer to operate two sites, one in Newark and the other in Orange.

101. Pricing and cost considerations were also informally reviewed by the County Treasurer's office in the period between January and July 1, 1987. The exact timing and nature of this review cannot be determined from the record.

102. The final negotiated price reflected in Essex's contracts with Solid Waste Transfer and WMNJ were approximately 10 to 15 percent lower than the prices quoted in respondent's and Solid Waste Transfer's responses to the Solicitation of Interest.

103. On July 1, 1987, Essex and WMNJ and the County and Solid Waste Transfer executed contracts, both of which were for the transportation and disposal of solid waste.

104. No rejected vendor expressed dissatisfaction with the County's process.

105. The content of the contract between Essex and Solid Waste Transfer is as stated in Exhibit P-5. The content of the contract between the County and WMNJ is as stated in Exhibit P-3.

106. Solid Waste Transfer's contract obligated it to construct and operate an interim emergency facility for the handling of solid waste. Solid Waste Transfer agreed to commence providing interim emergency services at the Avenue F site until the earlier of either August 1, 1988, or the issuance of an occupancy permit for the transfer station facility necessary to provide permanent service at the site. Solid Waste Transfer agreed to thereafter provide permanent services for the lesser of either five years from August 1, 1987 or until commercial operation of the resource recovery facility. The

commencement date was August 1, 1987 or such later time as Solid Waste Transfer would be capable of receiving solid waste and transporting such waste, but no later than January 1, 1988. As set forth in the contract, the tipping fee for municipal waste to be charged by Solid Waste Transfer and collected by Essex during the period of interim emergency service was defined to include any host community fee, Solid Waster Transfer's service fee, and additional charges, including administrative costs, franchise fees, or other charges deemed necessary by the County, and any taxes or surcharges imposed by law which Solid Waste Transfer was obligated to charge to persons delivering solid waste to the site. The service fee per ton for Type 10 waste was set on a sliding scale based upon daily average tonnage, with the fee increasing as tonnage decreased, ranging from $92.80 for 1,400-1,640 average daily tons to $97.30 for 1,000-1,100 average daily tons. The service fee to Solid Waste Transfer for waste Types 13, 23, 25 and 27 was a uniform fee of $105 per ton. The permanent tipping fees included the same elements. The service fees were to be increased each August 1, commencing August 1, 1988, to reflect 106 percent of the percentage increase since January 1 of the preceding year in the CPI-U for the New York/northern New Jersey area, calculated by applying 106 percent of the CPI-U to the contract year service fee.

107. The tipping fee and the service fees for Type 10 waste, as well as CPI escalators, incorporated in the agreement with Solid Waste Transfer are the same as in the similar Type 10 waste provisions of the contract with WMNJ. The contracts are, as found hereinabove, essentially the same.

108. The terms of the contract entered into with WMNJ ultimately was 30 months. WMNJ was obligated to build the Transfer Station in a month, so as to be operational by August 1, 1987, and the maximum anticipated wasteflows were 1,640 tons a day. The rail and bale operation

was abandoned, and WMNJ was obligated to transport waste over-the-road to disposal sites in Pennsylvania, or, if necessary, Ohio or Michigan. Essex was required to seek a franchise and also was obligated to deliver a minimum of 400,000 tons of Type 10 waste per year to the Transfer Station. The contract requires Essex to pay for shortfall and tonnage below the guaranteed minimal annual tonnage at the effective service fee rate (put-or-pay provision).

109. On July 1, 1987, the Essex Freeholders approved the contracts by resolution. The content of the resolution approving the contract with WMNJ is as stated in Exhibit P-4. The content of the resolution approving the contract with Solid Waste Transfer is as stated in Exhibit P-6.

110. The DEP issued an MPP to WMNJ on July 7, 1987. The content of this document is as stated in Exhibit J-3.

111. A finding articulated in the WMNJ's MPP was that:

> The permittee, through its affiliates, has demonstrated reliability, expertise and competence in the operational management of major waste handling facilities in New Jersey including landfills and a baling facility. The permittee is a subsidiary of Waste Management of North America, Inc., which is a leading national waste management concern with control over adequate disposal capacity to accept the expected waste loads to be delivered to this Transfer Station facility (Ex. WMNJ-3, p. 2).

112. Under its MPP, WMNJ was obligated to be capable of processing an average of 1500 tons per day of solid waste, commencing on August 1, 1987. Other pertinent requirements are mandated by the MMP. Staffing and supervision of the Transfer Station by competent, experienced personnel is a requirement, as is adequate equipment for loading and unloading waste and

adequate backup equipment. It is also WMNJ's responsibility to insure transfer of solid waste to a licensed disposal facility. WMNJ is accountable for any unacceptable or hazardous waste delivered to the Transfer Station if the generator or transporter cannot be identified. WMNJ is not permitted to keep solid waste on the tipping floor overnight. If such waste is not processed, it must be stored in enclosed and secured transfer trailers. Any solid waste remaining in the facility overnight must be transferred the morning of the next working day. On-street parking is prohibited.

113. Preconstruction requirements in the WMNJ MPP had to be complied with before construction activities occurred. At the time the MPP issued to WMNJ, only general engineering had been completed, with a general layout to identify the location of the transfer station building and its approximate size. Construction was thereafter permitted by the DEP to be phased in. There were no ceilings agreed upon with the DEP regarding the cost of implementing the MPP.

114. Definitions of pertinent waste types are as follows:

    Type 10 -- municipal waste (household), commercial and institutional; Type 13 -- bulky waste; Type 23 -- vegetative; animal and food processing waste; and Type 27 -- dry industrial waste.

115. Waste Types 10, 13, 23 and 27 may be accepted at WMNJ's facility. The following waste types are prohibited at the WMNJ's Transfer Station: Type 12, dry sewage sludge; Type 72, bulk liquids and semi-liquids; Type 72, septic tank clean-out waste; Type 73, liquid sewage sludge; and Type 74, hazardous waste.

116. The terms of the MPP issued to Solid Waste Transfer were essentially, in material aspects, the same as those contained in the MPP issued to WMNJ.

117. The eventual 2,600 tons-per-day requirement incorporated in Solid Waste Transfer's MPP was anticipated in light of its contract with Essex and Essex generated waste-flow previously received at the HMDC Landfill. The Solid Waste Transfer facility was designed to accommodate a waste-flow of 2,600 tons per day.

118. The vendors' decisions regarding the size of the facilities were reviewed and approved by the DEP, which was concerned that the size of the transfer stations be adequate to handle the total amount of waste expected to be generated by Essex. It is reasonable to conclude that the DEP would not have permitted programs to proceed which did not incorporate adequate physical plant to handle what the DEP believed would be the waste-flow in the County. At that time, no sites would be available for disposal of Essex County Waste within New Jersey.

119. The DEP followed the MPP procedure, with evolution of construction of the plant after operations commenced, with minimal initial improvements to the sites in question, in light of the deadlines and in light of the fact that the particular sites in question had been "carefully selected." (Tr., Vol. 15, P. 74). There were no understandings between the DEP and the vendors regarding the ultimate costs of the transfer stations nor any ultimate limits on the costs of construction.

120. The waste-flows previously proposed by the DEP became effective when adopted by the DEP and the Board in joint waste-flow regulations on July 27, 1987. (*See*, Finding of Fact No. 86).

121. M. Mauriello was an industry representative on the County Solid Waste Advisory Council (SWAC) from 1977 until approximately 1986. In that function, he participated in various planning duties assigned to SWAC, thereby gaining knowledge of the solid waste disposal needs in Essex. He resigned his position with SWAC because of his knowledge that the DEP had proposed transfer stations in other New Jersey counties and his

belief that it was likely such a Mauriello program would be proposed for Essex. M. Mauriello intended to participate if such a program were proposed for the County. He initially became aware that a transfer station program was going to be implemented in Essex with the publication of the Solicitation of Interest.

122. Joseph A. Mauriello, (J. Mauriello) Ph.D. and C.P.A., became involved with M. Mauriello in the formation and operation of Solid Waste Transfer in May 1986. J. Mauriello is a senior partner in the public accounting firm of Mauriello, Franklin & Co., and holds B.S., M.B.A., and Ph.D. degrees from New York University (N.Y.U.) in the fields of economics, finance and accounting. His B.S. degree is in business, his M.B.A. concentration was corporation finance, and his Ph.D. is in economics. He wrote his dissertation in accounting. He was a full professor of accounting at N.Y.U. for 24 years and, more recently, a professor at Seton Hall University, before retiring as Professor Emeritus. His responsibilities with Solid Waste Transfer included the development of financial data, including accounting statements and price projections, the development of negotiation positions in relation to Solid Waste Transfer's purchase of services, and raising capital for the transfer station project.

123. J. Mauriello assisted M. Mauriello in developing the transfer station project in the area of financial data (development of *pro formas*, price projections, etc.) and in the development of negotiating positions regarding services to be purchased by Solid Waste Transfer, including trucking, landfilling, and leasing arrangements, if necessary. J. Mauriello estimated the amount deemed to be a fair payment to an operating entity, which at that time he anticipated would be 442 Waste Management, Inc. (442 WMI.) His estimate in this respect was $14.78 per ton, which amount was reflected in the $105.30 per ton rate. J. Mauriello was involved in developing a service fee that was to be charged to Essex by Solid

Waste Transfer. The proposal was based upon estimates of expenses, as well as available actual expenses, such as landfill and transportation expenses the week right before the contract was awarded (the week before July 3, 1987). The resulting proposed $105.30 per ton contract price was computed by J. Mauriello and was based on an average for all types of waste, including Type 10.

124. One of his responsibilities was also to obtain any necessary capital. Solid Waste Transfer was initially capitalized with $100,000 in equity. J. Mauriello did not approach any conventional lending institutions because, in his judgment, the structure of the transaction being developed did not provide for collateral, which would be required by a conventional lender. He sought financing through private sources (including clients of his accounting practice, friends and relatives) and ultimately, by the end of June 1987, such sources had provided commitment of funds approximating $2 million. All of the funds were to be provided on a debt basis to J. Mauriello and by him, in turn, to Solid Waste Transfer. Ultimately, funds were provided for repayment as follows: $1,350,000, payable on or before September 1, 1989, $1,350,000 payable approximately December 31, 1990; and the balance of $516,000, payable on or before the end of the project. These figures reflect the fact that J. Mauriello loaned Solid Waste Transfer $1,350,000 in December of 1987. The agreed upon interest rates were as follows: (1) on the $1,350,000 due September 1989, 16 percent until April 1, 1988, and, thereafter, 13 percent, (2) on the $1,350,000 due December 31, 1990, 16 percent until April 1, 1988, and thereafter prime plus 4 percent; and (3) on the remaining $516,000 balance, 13 percent. The weighted average interest on all loans after April 1, 1988 approximated 13.5 percent.

125. Approximately $250,000 of the first referenced $1,350,000 loan came from personal funds of Joseph Mauriello and his wife. Approximately $500,000 of the total was loaned from J. Mauriello's son, Joseph

Mauriello, Jr., a doctor. J. Mauriello's son-in-law, Joseph A. Franklin, who was his partner, provided funds totaling approximately $150,000. The balance of the amount, approximately $450,000, came from clients, relatives and friends of J. Mauriello.

126. The source of funds for the second referenced $1,350,000 loan was J. Mauriello's children, Joseph M. Mauriello, Jr., Linda M. Franklin and Janet M. Simon, via a secured loan on property in East Brunswick, New Jersey, owned by the children, through a partnership known as FMS Realty (FMS), since 1975, which loan was from Mid-Atlantic National Bank. The loan represented the first mortgage on the property, which had been previously unencumbered. J. Mauriello personally guaranteed the loan. The interest rate on the loan was variable prime, plus one. At the time, the prime rate was 11 percent. The money was borrowed by FMS from Mid-Atlantic on December 8, 1987, and was, in turn, loaned to Joseph Mauriello and then by him, almost immediately, to Solid Waste Transfer, to pay expenses and debt. Joseph Mauriello had no security on his loan to Solid Waste Transfer.

127. The $516,000 loan came from J. Mauriello's own funds.

128. In addition to the three loans referenced hereinabove, Solid Waste Transfer borrowed $170,000 from M. Mauriello at the rate of 13 percent, repayable on or before the end of the project.

129. Prior to arranging private financing, J. Mauriello did attempt to pursue avenues of traditional financing. At some time early in 1987, he contacted a bank branch office of Credit Agricola, receiving a response in February 1987. This response indicated that primary emphasis would be placed upon establishing and insuring a waste flow by appropriate governmental agencies and the establishment of a rate of return by regulatory authorities. Although some discussions ensued, Solid Waste Transfer received no further follow-up communications on

behalf of Credit Agricola. J. Mauriello also communicated with the then Director of the Essex County Development Corporation, and was advised that financing might be available if collateral were obtained. Since the collateral was required to be in the form of land and improvements thereto, which were not forthcoming, those discussions did not come to fruition. J. Mauriello also communicated with Mid-Atlantic National Bank regarding financing , a bank with which he has had close ties for a number of years. Solid Waste Transfer initially considered financing the purchase of trailers, but was not able to develop financing agreements with Mid-Atlantic National Bank because of the uncertainties involved with the transfer station program. He also contacted National Community Bank, but was again unable to arrange for capital in the absence of collateral and an asset base. He unsuccessfully spoke to personnel of Community National Bank, individuals at the Executive Vice-President level, in October 1987, at which point Solid Waste Transfer had been financed with approximately $2,000,000 in personal financing. He was not able to obtain any loans at that point.

130. J. Mauriello and M. Mauriello personally financed expenses for engineering consultants, travel, and similar expenses, up until the time Solid Waste Transfer was capitalized. Such capital, as referenced, consisted of personal loans made by shareholders to the firm and through capital investments by shareholders. The response to the RFP, which included engineering reports and traffic studies, cost $30,000, paid to JCA Associates (JCA), an engineering firm, which amount was paid by J. and M. Mauriello from funds in personal checking accounts.

131. M. Mauriello began looking for sites for the construction and operation of a transfer station in the County as early as August 1986. He relied upon the siting guidelines published by the DEP in its RFP, assuming that Essex would ultimately adopt such guidelines if it

implemented a transfer station program, and attended a meeting conducted by the DEP on its RFP request for Passaic County. M. Mauriello inspected and negotiated for several potential sites in the County. These included the Reingold site in Orange, a car compound owned by the City on Evergreen Place and Frelinghuysen Avenue, and the Orbis site. The Orbis site, as found, had potential ECRA problems. The Evergreen Avenue site was limited because of traffic considerations. The Orange site was eliminated because it could not be used quickly. He also inspected a site on Route 21 in Newark, a five-acre site on Wilson Avenue, and a site owned by Newark Disposal. Negotiations for these sites were not pursued, largely because their owners did not want the properties used for a transfer station operation. Negotiations were initiated regarding an Allstate Junk Dealer's site on Standish and Lakeside Avenue in West Orange, which negotiations were terminated because of potential community opposition.

132. At this time, M. Mauriello also contacted JCA to obtain assistance and advice from an engineering perspective regarding potential sites and concerning the technical aspects of preparing a response to what he assumed would be an RFP by the County. JCA examined each site for which some interest was expressed by the owner. JCA also gave oral reports to M. Mauriello, which reports were used during the course of negotiations.

133. Solid Waste Transfer leases the property on which the Avenue F Transfer Station is located from Glopak Corporation (Glopak). The content of this lease which was executed June 22, 1987, is as stated in Exhibit P-SWTR-1, P-2. The monthly rent pursuant to the lease is $75,000. The rent is paid on a net, net, net basis with Solid Waste Transfer paying all expenses and maintenance, including its proportionate share of real estate taxes. Solid Waste Transfer is obligated to deliver the premises to Glopak at the expiration of the lease with all

applicable ECRA clearances in place. The term of the lease is for five years with an option to renew for so long as Solid Waste Transfer is authorized to operate a solid waste transfer station on the site.

134. Harold Martin, Sr. first met M. Mauriello in April 1987, at which meeting M. Mauriello informed Martin, Sr. that he would like to buy the property located at 442 Frelinghuysen Avenue. Negotiations for the Avenue F site did not occur prior to the time the response to the Solicitation of Interest was submitted for the site now occupied at 442 Frelinghuysen Avenue. Negotiations for that site began in late April or early May 1987.

135. Upon initially finding the 442 Frelinghuysen Avenue site, M. Mauriello concluded that because of its configuration and the visual protection provided by buildings at the front of the site, it would be suitable for temporary operations while a permanent plant was in construction. The site at 442 Frelinghuysen Avenue was reviewed by JCA for M. Mauriello and was found not to have traffic limitations, such as those pertaining to the site on Evergreen Place. The Avenue F site also was completely blocked from any receptors of noise, odor, or other similar factors relative to siting a transfer station.

135. M. Mauriello also contacted Chambers Development Company (Chambers) in the Fall of 1986 to determine whether Chambers would be willing to provide a Letter of Intent regarding provision of landfill space for Essex waste.

136. Waste flows to the Hill Street site were not eliminated from Essex's District Plan until April 1988. The Hill Street site has never been used.

137. Martin, Sr. is an officer, director and shareholder of Glopak.

140. In late April or early May 1987, M. Mauriello, later joined by J. Mauriello, began negotiations with Martin, Sr. for the purchase of the 5.7 acre site at 442

Frelinghuysen Avenue. Martin, Sr. did not want to sell the site to the Mauriellos, but indicted that he might be agreeable to leasing a portion of it. It was not until June of 1987 that "the first real serious discussion" regarding the terms of a lease were conducted by Martin, Sr. and the Mauriellos. (Ex. P-SWTR-2, p. 4). The parties also initiated discussions regarding price at that time. A lease price was not reached until days before the Mauriellos executed the agreement.

138.. At the time of the negotiations, specifically in June 1987, Martin, Sr. had no financial or ownership interest in the project then being proposed by Solid Waste Transfer to Essex.

1389 At some point, there were discussions between the Mauriellos and Martin, Sr. regarding participation by Martin, Sr., or others, in Solid Waste Transfer as an equity shareholder. At the time the lease was signed between Solid Waste Transfer and Glopak, there had been unsuccessful negotiations between the Mauriellos and Martin, Sr. regarding Martin, Sr.'s participation as an equity holder in Solid Waste Transfer.

141. At the end of July 1987, an agreement was reached under which Harold Martin, Sr. acquired 20 percent of Solid Waste Transfer's stock (for $20,000); and Patrick Giordano, Jr., 10 percent. After those acquisitions, J. Mauriello and M. Mauriello each held 35 percent of the stock. The equity capital reflected in the stock ownership of these four individuals totals $100,000.

142. The current Board of Directors of Solid Waste Transfer is comprised of M. Mauriello, J. Mauriello, Lowell Martin, Patrick Giordano, Jr. and Martin, Sr. The current officers of Solid Waste Transfer are M. Mauriello, president; Lowell Martin, vice-president; J. Mauriello, treasurer; and Martin, Sr., secretary. Solid Waste Transfer has three employees, M. Mauriello, J. Mauriello, and Martin, Sr.

143. At the time the agreement was executed between the County and Solid Waste Transfer (July 1, 1987) and at the time Solid Waste Transfer's MPP was issued (June 30, 1987), the shareholders of Solid Waste Transfer were J. Mauriello and M. Mauriello.

144. Solid Waste Transfer does not itself perform any of the transfer, transport, and disposal operations associated with the Avenue F Transfer Station. The actual operation of the Avenue F Transfer Station is performed by Environmental Waste Processing (EWP), formerly known as 442 WMI. The name of 442 WMI was changed because of an objection to the use of the name "Waste Management, Inc." by WMI.

145. On July 23, 1987, Solid Waste Transfer entered into a contract with 442 WMI pursuant to which the latter agreed to operate the transfer station facility and to provide all manpower and equipment necessary to comply with the MPP issued to Solid Waste Transfer and ultimately load waste onto trailers to be supplied by Multi-State Intermodal Systems, Inc. (MIS) which, at that time, was expected to be the trucking firm. The content of the contract between Solid Waste Transfer and 442 WMI is as stated in Exhibit P-SWTR-1, P-11.

146. At the time Solid Waste Transfer entered into the contract with 442 WMI (July 23, 1987), the shareholders of 442 WMI were Louis Mauriello, Mark Joseph Mauriello, Michael Vincent Mauriello, Linda M. Franklin, Joseph A. Mauriello, Jr. (J. Mauriello, Jr.), Rueben Hunter, Joseph Solomon, Barbara Martin, Harold Martin, Jr., and David Giordano. The President of 442 WMI was Daniel J. Fasano (Fasano). There has never been any cross-management between Solid Waste Transfer and 442 WMI. Louis Mauriello, Mark Joseph Mauriello and Michael Vincent Mauriello are M. Mauriello's sons. Linda Franklin and J. Mauriello, Jr. are J. Mauriello's children. Barbara Martin is the wife of Harold Martin, Sr.; Harold Martin, Jr. is the son of Harold Martin, Sr.

David Giordano is the son of Patrick Giordano, Sr. and the brother of Patrick Giordano, Jr. At the time Solid Waste Transfer entered into negotiations with 442 WMI, December 1987 through February 1988, Louis Mauriello, Mark J. Mauriello and Michael Mauriello were shareholders of 442 WMI. Louis Mauriello, Mark Joseph Mauriello, Michael Vincent Mauriello and David Giordano each own ten percent of the EWP shares. Joseph A. Mauriello, Jr. and Linda Franklin are cousins of M. Mauriello. Ruben Hunter and Joseph Solomon each own three percent of the shares of EWP. H. Martin, Jr. owns shares in EWP; the exact amount is not apparent from the record.

147. Bob Demane is not an officer of EWP. Although not entirely clear, it is reasonable to infer that at one time, prior to the corporate name change, that he was an officer of 442 WMI. Although not entirely clear, Demane apparently was not the original secretary of 442 WMI. At the time of negotiations with Solid Waste Transfer, mid July 1987, Demane was not an officer of 442 WMI and was not involved in any aspect of the transfer station operations.

148. As of December 1987, Daniel Fasano (Fasano) was the president of 442 WMI/EWP. Although not entirely clear, it appears that Patsy Giordiano, Sr., and Louis Mauriello were not officers of 442 WMI/EWP as of that time.

149. Although not entirely clear from the record, it appears that at one point in time, there was a minority shareholder lawsuit pending between Glopak and EWP. At the time of hearings, there was pending a lawsuit initiated by Pat Giordano, Jr. against M. Mauriello, J. Mauriello, and Martin, Sr. There was also pending a minority shareholder suit involving EWP/442 WMI, initiated by Joseph Solomon and Rubin Hunter against David Giordano, Fassano, and Demane. There was also a pending suit by Advanced Transportation Services

against J. Mauriello, M. Mauriello, Martin, Sr., Martin, Jr., and Louis Mauriello. At one point, Glopak was suing J. Mauriello and M. Mauriello. David Giordano initiated a minority shareholder's suit, involving EWP, against Joseph Solomon, Rubin Hunter, and Louis Mauriello.

150. Dennis M. Grimm (Grimm) is President of WMNJ and WMPA. Joseph M. Moisten (Holsten) is Vice-President/Treasurer and Secretary of WMPA and Vice-President of WMNJ. George D. Asciutto, Joseph Graziano and Jeffrey H. Adler (Adler) are Vice-Presidents of WMPA and WMNJ. Adler is also an Assistant Secretary of WMNJ and WMPA, as is David I. Kopp. Susan Nutra is an Asssistant Treasurer of WMPA and WMNJ.

151. H. Martin Sr. is an officer, director and shareholder of Glopak. Joseph Solomon is a shareholder and officer of Glopak. Rueben Hunter is not a shareholder of Glopak, but is an officer of Glopak.

152. Solid Waste Transfer is essentially a "cash receipts disbursements operation." It has one customer and bills Essex weekly for one sum. Its disbursements are for rent, transportation, and landfilling services, areas in which Solid Waste Transfer has contracts. (Tr., Vol. 16, p. 177). As found, the actual operation of transfer station activity is handled by EWP. EWP is required to provide equipment to receive, spread, and load garbage and personnel to perform these functions, to maintain insurance, and to generally insure that operations run properly. Solid Waste Transfer and 442 WMI/EWP were established as two separate companies because of advice from counsel to the individuals involved, including J. Mauriello, that it was "typical" in the solid waste industry to have an operating company separate from a utility or franchisee because of considerations such as liability exposure, *Id.* p. 171. Solid Waste Transfer and EWP maintain separate records, checking accounts, individual trial balances and financial

statements. Each company has established a separate intercompany account on its books, each account having the same balances, showing what each owes the other.

153. At the time a determination was made on behalf of Glopak to enter into the lease agreement, neither Martin, Sr. nor his children had any ownership interest in 442 WMI. Martin, Sr. has never participated in the management of 442 WMI/EWP.

154. Martin, Sr. actively participates in the management of Solid Waste Transfer and has the responsibility to oversee the performance of EWP on the site to insure compliance with the requirements of the MPP.

155. Martin, Sr.'s "chief business" is Glopak, which is engaged in the business of manufacturing plastic bags. (Ex. P-SWTR-2, p. 1). Glopak operates from 296 South 6th Street, Newark, and owns land at 442 Frelinghuysen Avenue, in Newark, consisting of approximately 5.7 acres, and currently, approximately 57,000 square feet of building other than the transfer station now constructed on the site. Jersey Polymer, Inc., a company engaged in the manufacture of plastic bags and recycling of plastic scrap, occupies approximately 37,000 square feet of those buildings not occupied by the transfer station. Solid Waste Transfer occupies approximately 14,000 square feet of such building space for clerical, administrative and other functions. The remaining balance of this footage, approximately 7,000 square feet, is occupied by Electric Motor Repair, an electric motor repair shop.

156. The contract price between Solid Waste Transfer and 442 WMI was based upon projections by 442 WMI regarding what its costs would be to operate the plant and provide equipment, assuming receipt of 2600 tons of waste per day. The price, based upon the assumed 2600 tons per day of solid waste, resulted in a $14.78 per ton price for operating the plant and supplying all necessary equipment.

157. As found hereinabove, in preparation for responding to an anticipated Solicitation of Interest, M. Mauriello contacted Chambers Development in the fall of 1986 to determine whether it would be willing to provide a Letter of Intent regarding the provision of landfill space for Essex County waste. Subsequent to its successful negotiations with Essex, Solid Waste Transfer entered face-to-face negotiations with Chambers Development, which negotiations were conducted in both Pittsburgh and New Jersey and ultimately led to the execution of a landfill agreement on July 23, 1987. The content of this agreement is as stated in Exhibit P-SWTR-1, P-5. The contract was executed pursuant to a commitment given by Chambers Development to Solid Waste Transfer on February 24, 1987 for disposal space in landfills owned or leased by Chambers Development for what was referred to as "Acceptable Waste" from the transfer station (Ex. P-SWTR-1, P-5, p. 1).

158. "Acceptable Waste" is defined in the contract between Solid Waste Transfer and Chambers Development as municipal waste and residual waste that has been approved by the PADER and Chambers Development for disposal at the "Landfill," *Id.* p. 2. The "Landfill," in turn, is defined as the primary site, the Arden Landfill operated by a Chambers Development subsidiary, William H. Martin, as the secondary site, the Southern Alleghany's Landfill operated by another Chambers Development subsidiary, Southern Alleghany's Disposal Service, Inc.; and also "any and all other sites" which Chambers Development is allowed to use as a landfill, *Id.* pp. 4-5. "Municipal Waste" and "Residual Waste" are defined by reference to any applicable Pennsylvania statutes and other laws, *Id.*, pp. 4-5. The contract also references a waste transportation agreement which was then executed by and between Chambers Development and MIS.

159. Pursuant to the contract, Solid Waste Transfer agreed to deliver to the Landfill, and Chambers Development

agreed to permit Solid Waste Transfer to deliver, all acceptable waste received at Solid Waste Transfer's facility. Chambers Development has the right to direct acceptable waste to other sites, with applicable price adjustments, upon 30 days prior written notice, except in emergency situations. The contract, which is for a five-year period, was based upon quantities of acceptable waste not exceeding 2600 tons daily, excluding Sundays. The price per ton for each year of the contract reflected in the agreement is as follows: $30.00 during year one, $31.00 during year two, $32.00 during year three, $35.00 during year four, and $36.00 during year five. The rates, which were subject to increases reflecting any increases in disposal costs as a result of changes in law, are exclusive of any taxes or other fees or charges imposed or received by any governmental body regarding the waste in question. The contract reflects agreement that Solid Waste Transfer would deliver to the Landfill, or other designated site, all acceptable waste other than residual waste received at the Transfer Station. Solid Waste Transfer represented that it had obtained approval of the Transfer Station in the County District Plan. The contract provides that a default by MIS under the solid waste transportation agreement, or any agreement between Solid Waste Transfer and MSI, shall not be deemed a default by either Chambers Development or Solid Waste Transfer.

171. At the time Solid Waste Transfer was negotiating with MIS and Chambers Development, DEP personnel felt that Essex generated the most volume of residual waste in the County.

172. There is no relationship between Harold Martin and William H. Martin, the similarity in names being a matter of coincidence.

160. When Solid Waste Transfer first negotiated a contract with Chambers Development in 1987, Chambers

Development was utilizing its landfills in Arden and Washington Township, Pennsylvania.

161. M. Mauriello was instrumental in ultimately negotiating a transportation agreement between Solid Waste Transfer and MSI. His initial contacts with MIS were through Sam Iorio, a principal of that company, in approximately 1987. At that time, MIS was the only company, of which M. Mauriello had knowledge, that was willing to provide trucking commitments to transport waste from the County to Chambers Development's landfills in Pennsylvania and to provide a potential rail alternative, which at that time was deemed to be an important aspect of Solid Waste Transfer's proposal to Essex. Numerous meetings were held between MIS and Solid Waste Transfer representatives between February and April 1987, resulting in the transportation aspects of Solid Waste Transfer's ultimate response to the Solicitation of Interest. A fair price was not agreed upon at these early meetings, although MIS provided Solid Waste Transfer with "preliminary transportation numbers," which data were used for developing Solid Waste Transfer's proposal to Essex (Ex. P-SWTR-1, p. 14).

162. The content of the agreement between MIS and Solid Waste Transfer, which was executed in June 1987, is as stated in Exhibits P-STWR-1 (P-6) and N-28 (E). The agreement generally provides for the transportation of solid waste to both Chambers Development landfills and to landfills which MIS obtains and which will agree to accept deliveries of waste which cannot be delivered to Chambers Development landfills by MIS. The agreement provides for interim transportation by tractor trailers until intermodular trailers can be loaded by compacting units. It also incorporates a provision for rail transport.

163. There is no cross-ownership or identity of officers and directors between MIS and Solid Waste Transfer.

164. Residual waste generally is waste which is a by-product of manufacturing.

165. Because residual waste was not acceptable to Chambers Development, Solid Waste Transfer made disposal arrangements for such waste with Advanced Transportation Services (ATS). Solid Waste Transfer initially reached an oral agreement with ATS for the transport and disposal of residual waste. The negotiations, which occurred in approximately mid-July 1987, were conducted with Demane, whose exact title cannot be determined from the record, although he may have been a general manager and/or a principal of ATS. In any event, he had authority to contract on its behalf. M. Mauriello had previously, during negotiations with MIS, been quoted a price of $136 per ton for residual waste, constituting the dumping price at landfills. ATS offered a price of approximately $80 per ton, which was acceptable to M. Mauriello, who, in turn, estimated that residual waste from Essex would total 200 tons per day. Based upon the imminence of the August 1987 opening date of the Transfer Station, the price quoted by MIS, the lack of what M. Mauriello deemed to be any other reputable truckers available, and the fact that he believed MIS would be a back-up regarding residual waste, M. Mauriello determined to enter into the oral agreement with ATS. This oral agreement was subsequently reflected in a written transportation disposal contract which was executed by Solid Waste Transfer and ATS on February 1, 1988. The content of this contract is as stated in Exhibit P- SWTR-1, P-7.

166. As a general matter, waste requiring either special or additional permits, which is often the case when waste is destined for out-of-State landfills, including landfills in Pennsylvania, has higher disposal costs associated with it.

167. Residual waste is a separate classification in Pennsylvania and is not accepted at all landfills.

168. MIS experienced difficulty performing its transportation obligations to Solid Waste Transfer during August 1987, essentially not performing pursuant to its contract with Solid Waste Transfer, resulting in accumulation of waste at the Avenue F Transfer Station. Demane, who was on-site at the time in relation to ATS' disposal of residual waste, informed M. Mauriello that ATS could handled the waste serviced by MIS. ATS agreed to transport the accumulating waste at a rate of approximately $1.30 less per ton than had been charged by MIS, an offer accepted by Solid Waste Transfer.

169. Problems again developed with MIS in early 1988. Representatives of MIS complained to M. Mauriello during January 1988 regarding a decrease in tonnage serviced at the Transfer Station, indicating that M. Mauriello was not "being aggressive enough in addressing these issues." (Tr., Vol. 10, p. 43). At that time, MIS was transporting three or four truckloads per day. Some time during February 1988, MIS, without any notice, stopped sending workers to the Transfer Station and transporting waste pursuant to their contract with Solid Waste Transfer. ATS, which had individuals on the site, began transporting all of the waste. Subsequent to February 1988, Solid Waste Transfer did not receive any official communications from MIS until approximately March 1989, when it received notice of a law-suit. Garbage would have accumulated at the Transfer Station if ATS had not been engaged to remove waste that had been serviced by MIS.

170. In the above above referenced lawsuit, MIS claims, among other things, that Solid Waste Transfer did not satisfy the tonnage requirements of their agreement.

171. At the time Solid Waste Transfer was negotiating with MIS and Chambers Development, DEP personnel felt that Essex generated the most volume of residual waste in the northern New Jersey area.

173. There is no corporate relationship or affiliation between EWP and Chambers Development.

173. The only time prior to February 1988 that garbage accumulated at the Solid Waste Transfer station site was during the first ten days of operations in August 1987, as referenced hereinabove. At that time, Amato visited the site and personally expressed to M. Mauriello his dissatisfaction with any accumulation of garbage at the Transfer Station. These communications reflected concerns previously communicated by Amato in July 1987 regarding whether Solid Waste Transfer, a newly formed company, would be able to satisfactorily operate the Transfer Station.

175. At the time of final price negotiations between the County and the Mauriellos, M. Mauriello had personally invested funds regarding the response to the Solicitation of Interest.

176. The final costs of construction of the Solid Waste Transfer Station exceeded original estimates by approximately $1,500,000. The contract between Solid Waste Transfer and Essex did not provide for any escalation in price as a result of a higher cost of construction.

177. As a result of the July 1987 PADER litigation referenced hereinabove, Chambers Development took the position that it was unable to accept all the waste delivered to it by the Avenue F Transfer Station at the primary disposal site in Pittsburgh, Pennsylvania. Chambers Development therefore began directing the flow of waste to a number of different landfills in Pennsylvania, Ohio, West Virginia, and possibly, other places. Solid Waste Transfer's contract with Essex did not provide for any cost escalation as a result of such development.

178. As a result of the 1987 PADAR litigation, Solid Waste Transfer experienced "severe problems" with the availability of trailers to load the quantity of waste that was

then being delivered to the Transfer Station (Ex. P-SWTR-1, p. 23). Various explanations were given by Chambers Development and MIS. MIS represented that it had insufficient trailers, and Chambers Development represented that it had problems in performance caused by the change in landfill sites resulting from the litigation. Whatever the cause, deficiencies in transporting and disposing of the waste resulted in a build-up of waste at the site. This situation did not result in a change in the contract price with the County.

179. Because of Chambers Development's, dissatisfaction with the low flow of waste going to its landfills, and in order to insure continued access to landfill space, Solid Waste Transfer renegotiated its agreement with Chambers Development. The renegotiated contract, the content of which is stated in Exhibit P-SWTR-1, P-12, includes trucking. The renegotiated contract, which was executed in September 1988, amends the contract initially entered on July 23, 1987.

180. On September 9, 1988, Solid Waste Transfer entered into an agreement with Chambers New Jersey Trucking, Inc., a subsidiary of Chambers Development, for the transportation of waste from the Transfer Station site. The content of this contract is as stated in Exhibit P-SWTR-1, P-13.

181. The contracts referenced in Findings of Fact Nos. 179 and 180 reflect the fact that Chambers Development had, at the time of renegotiation, designated its sanitary landfills, known as the Arden Landfill and the Empire Landfill, in Taylor, Pennsylvania, as the sites specified to receive the amended quantities of solid waste, subject to the provisions of the waste disposal agreement as amended, for the receipt and disposal of solid waste received and processed at the Transfer Station.

182. Solid Waste Transfer never constructed a facility at the Orange site because of the less than anticipated waste flow. Solid Waste Transfer recommended that plans to

construct on the Orange site be postponed until it became apparent that there would be sufficient waste flow to require a second site and to support it economically. That recommendation was accepted by the DEP and the County. However, Solid Waste Transfer was required to maintain the availability of the Orange site and still pays rent on it as a result. The monthly rent for the site is $3,750. In approximately November 1988, Solid Waste Transfer and HMB Realty Partnership executed an agreement regarding the Orange site. The content of this agreement is as stated in Exhibit P-SWTR-1, P-14.

183. Not all the renegotiated agreements were less attractive to Solid Waste Transfer. However, the renegotiated Chambers Development agreement was. It incorporated "put or pay" obligations to Chambers Development which did not exist in the original contract. Solid Waste Transfer is obligated to pay for a minimum amount of tonnage if the actual tonnage disposed decreases below this specified amount. The cost of this risk cannot be passed on to Essex pursuant to Solid Waste Transfer's contract with the County. Solid Waste Transfer was able to avoid "put or pay" costs by "slim margins." (Ex. P-SWTR-1, p. 29).

184. Tipping fees for Type 10 waste in counties other than Essex applicable as of June 1989 were as follows:

County, Authority	Municipal ID-10 Waste Tipping Fee per Ton
Passaic County Utilities Authority	$ 9.86 [sic]
Mercer County Improvement Authority	92.26
Essex County	102.15
Bridgewater Resources, Inc.	113.95
Morris County Transfer Stations, Inc.	122.42
Union County Utilities Authority	132.65

Ellesor, Inc.	136.35
Somerset Intermediate Recycling	123.00
Bergen County Utilities Authority	105.81
Sussex County Utilities Authority	110.00
Hunterdon County Utilities Authority	125.75

185. As of January 1990, the rates filed with the Board by the Passaic County Utilities Authority (PCUA) were $88.943 for municipal waste, $128.788 for residual waste and $150.505 per ton for hospital waste.

186. The PCUA purchased rights in Chambers Development landfills. The transfer station services, which are provided for the PCUA by Pen Pac, Inc. (Pen Pac) therefore do not include the actual disposal cost of municipal waste. The PCUA paid $55 million for rights in Chambers landfills, a debt payable over a 20-year period. The PCUA rates are also exclusive of taxes or host community benefits.

187. The contract between the PCUA and Pen Pac provides for escalations in rates for the remaining years of the contract. The transporter charges for handling waste are $50.75 for 1988; $58.75 for 1989; $63.75 for 1990; $65.75 for 1991; and $68.75 per ton for 1992. The rates were approved by the Board.

188. The Board has approved, specifically finding the rates to be just and reasonable, rates for the Morris County Transfer Station (MCTS). The Board found that interim rates for 1988 and 1989 in the amount of $122.42 per ton for regular waste and $147.83 per ton for special waste were just and reasonable. The Board also approved the following rates for the MCTS as being just and reasonable:

	(Regular) Solid Waste Types 10, 13, 23, 25	(Special) Solid Waste Types 10, 27
1990	$ 117.60 per ton	$ 143.83 per ton
1991	125.48 per ton	156.22 per ton
1992	131.75 per ton	166.98 per ton
1993	138.34 per ton	171.13 per ton
1994	145.26 per ton	179.69 per ton

189. The County of Mercer purchased air rights; its rates are exclusive of disposal costs.

190. At the time the contract was executed between WMNJ and Essex, the County anticipated that the resource recovery facility would be operational in January 1990.

191. Pursuant to its contract with WMNJ, the County is required to pay for shortfalls in tonnage below the guaranteed minimal annual tonnage at the effective service fee rate ("put-or-pay" provision).

192. Pursuant to its MPP, WMNJ was required to be able to process an average of 1500 tons per day of solid waste as of August 1, 1987.

193. There were no start-up problems at the Avenue A Transfer Station, and there have been none since it became operational on August 1, 1987.

194. The operating hours of the Avenue A Transfer Station are 6:00 a.m. to 5:00 p.m., Monday through Friday, and 6:00 a.m. to 12:00 noon on Saturdays. Solid waste is delivered through the main gate. inbound collection vehicles traverse an Inbound scale and are weighed for gross weight. Tickets are provided to the collectors. Transfer station employees direct vehicles into bays where garbage is unloaded. Empty vehicles traverse an outbound scale and are again weighed. Bulldozers move garbage, which is picked up, collected and placed in

transport trailers dispatched to out-of-State disposal sites. Incoming empty trailers are dropped off in a staging area, and a loaded truck is picked up. Vehicle personnel are given assignments or dispatches from a dispatcher. Once in position in the loading area, it may take as little as five minutes to load a vehicle. A loaded trailer proceeds to what is referred to as a tarping area, where several minutes are consumed putting a tarp on the vehicle. The trailer then proceeds to the staging area, where it sits unless moved. A yard trailer, operated by a transfer station employee known as a "jockey," moves the trailer from the staging area, to the loading area, to the tarping area, and back to the staging area. Two trailers are loaded simultaneously.

195. Receipts indicating volume and type of waste disposed of at the Avenue A Transfer Station are in three parts. One part is kept by the facility; the second is provided to the hauler; and the third is given to the County for billing purposes. The information comes from the Transfer Station's computer system. The County also receives a daily computer printout on all transactions from the Transfer Station, which document is used for billing by Essex. All accounts are on the Transfer Station's computer system.

196. WMNJ owns the trailers used to transport waste from the Avenue A Transfer Station to out-of-State disposal sites. A trailer holds between 20 and 21 tons of waste. WMNJ had 85 trailers on site upon start-up of the facility to meet MPP capacity, storage, backup and operational requirements.

197. WMPA provided the commitment of landfill air space for disposal of County waste for the term of WMNJ's contract with Essex pursuant to oral agreement. WMNJ did not have agreements with specific landfills. WMPA coordinated use of air space. G.R.O.W.S. landfill (G.R.O.W.S) and Tully Town Landfill (Tully Town) in eastern Pennsylvania, near Morrisville, were to be the

main disposal sites. Backup landfills included Modern Landfill (Modern), and Lake View Landfill (Lake View) both located in York, northwestern Pennsylvania.

198. Daily intake volume at Pennsylvania landfills is limited by law in Pennsylvania. During the term of WMNJ's contract with the County, disposal at some of the landfills used, including G.R.O.W.S., was periodically curtained because of cell construction.

199. Generally, the lower priced Pennsylvania landfills are in the western part of the State, farther from population centers in New Jersey and the Philadelphia area, with concomitant higher transportation costs than closer located sites.

200. G.R.O.W.S. is open from 6:30 a.m. to 4:30 p.m., Monday through Friday, and 6:30 a.m. to 2:00 p.m. on Saturdays, during the winter and fall. G.R.O.W.S. is open from 6:00 a.m. to 4:30 p.m. Monday through Friday, and 6:00 a.m. to 2:00 p.m. Saturday, in the spring and summer.

201. Tully Town and G.R.O.W.S. are approximately 146 miles, round trip, from Newark. Modern and Lake View are approximately 351 and 800 miles, round trip, respectively, from Newark.

202. It is possible for a transporter to make three trips in a 19-hour day from the Avenue A Transfer Station to G.R.O.W.S. or Tully Town. It is feasible for a transporter to make a round trip to Modern from Avenue A and still make one round trip to G.R.O.W.S. in the same day. A round trip to Lake View from Avenue A is a two-day journey.

203. During the term of its contract with Essex, waste from the Avenue A Transfer Station was disposed of primarily at G.R.O.W.S., with a "significant portion" being disposed of at Modern. A "small fraction," approximately 1/10 on average in a year, was disposed of in western Pennsylvania (Tr., Vol. 30, p. 109).

204. WMNJ entered into written contracts with an independent, third-party transporter on August 1, 1987. The content of this contract is as stated in Exhibit WMNJ-6.

205. The Avenue A facility was constructed on an emergency basis. Existing buildings were gutted and improvements made, in addition to new construction in a little more than one month's time. WMNJ arranged for equipment and employees to operate the facility and made arrangements with trucking contractors for disposal out-of-State in order to meet the August 1, 1987 deadline. The contract entered into with Essex recognized that the County had determined that "emergent arrangements and facilities" had to be implemented for the processing, transportation and disposal of solid waste and that WMNJ had agreed to make a "substantial financial investment" to provide for the operation of a transfer station, including disposal, in response to Essex's request for "emergency facilities," and that such financial investment was being made because of the "emergent needs" for the operation and construction of a facility, resulting in the incurrence by WMNJ of "substantial and accelerated start-up costs and obligations for the design, acquisition of property and equipment, construction, site improvements, and other related emergent expenditures." (Ex. P-30, pp. 2-3.)

206. WMNJ invested more than $11,250,000 in the Transfer Station, including a $2 million purchase price for the site. As found, WMNJ owns the trailers used to transport waste from the Transfer Station to out-of-State disposal sites. Upon start-up, WMNJ mobilized 85 trailers on an emergency basis.

207. Waste Management of North America, Inc. (WMNA) provides management and supervisory services for the Avenue A transfer station at corporate and regional offices. The total management fee paid for services provided by WMNA is calculated at four percent of gross revenues.

208. WMNJ entered into a three-year union contract on August 2, 1987 providing for annual wage increases. The increases incurred ranged from approximately four percent on August 1, 1988 to almost five percent on August 1, 1989.

209. WMPA's charges to WMNJ for disposal at G.R.O.W.S. were initially $5.66 per ton. All landfill charges were subject to annual cost-of-living increases, as well as increases for any applicable Pennsylvania surcharges, environmental improvement cost, and host community benefits. By 1989, the charge for disposal at G.R.O.W.S. or Tully Town was $66.62 per ton.

210. WMNJ's actual expense for disposal for the 12 months ending July 31, 1988, was $48.29 per ton; for the year ending July 31, 1989, $61.54 per ton; and for the 12 months ending July 31, 1990, $66.96 per ton. Actual transportation and disposal costs for the same periods were $66.12, $72.43, and $77.65 per ton.

211. Applying the CPI escalator clause, a reasonable calculation of disposal costs for the WMNJ facility to Essex for the 12 months ending July 31, 1988 is $55.66 per ton; for the year ending July 31, 1989, $59,70 per ton; and for the year ending July 31, 1990, $62.48 per ton. Reasonable approximations of the expenses to Essex during the period of its contract with WMNJ for transportation and disposal costs are, for the same periods, $66.18, $69.73, and $72.98 per ton.

212. WMNJ's initial agreements with transporters provided for a charge of $200 per load for waste taken to G.R.O.W.S. or Tully Town and a charge of $1.02 per mile to transport waste to any other disposal site more than 300 miles, round-trip, from the Avenue A Transfer Station. Shortly after the Transfer Station commenced operations in 1987, revised transportation agreements were orally negotiated. The flat fee charges for transportation to G.R..O.W.S. was increased to $220 per load. Flat charges were established for transportation to

Modern and Lake View of $510 per load and $950 per load, respectively.

213. WMNJ's actual costs for out-of-State disposal increased by 27 percent from the first contract year to the second, including payments for the Pennsylvania surcharge, and by nine percent from the second year to the final six-month period ending January 31, 1990. Disposal costs increased by 39 percent over the term of the contract.

214. At the time the MPP issued, only general engineering had been completed at the Avenue A site.

215. Landfill rates in New Jersey in July 1988 ranged from approximately $20 per ton to $81 per ton, the low rate being charged at the Edison Municipal Landfill, which takes waste from Edison, Metuchen and Highland Park. The highest rate was charged by Newco Waste Systems, Inc. a/k/a Pinelands Park, which receives waste from 19 communities in Atlantic County. Other facilities at the high end of the scale were the Gloucester County Improvement Authority, the Pennsauken Solid Waste Management Authority, the Monmouth County Reclamation Center, and the Ocean County Landfill, with tariff rates of $58.87 per ton, $63.05 per ton, $68.20 per ton, and $73.35 per ton, respectively.

216. Between May 1985 and January 1987, average landfill prices increased by 22.7 percent in eastern Pennsylvania, where G.R.O.W.S. and Tully Town are located. During the same period, average prices increased by 74.1 in central Pennsylvania, where Modern is located. During the next year, increases in these areas were 65.5 percent and 13.5 percent, respectively. In 1987, average landfill prices increased by 56.3 percent in northwestern Pennsylvania, where Lake View is located. Between January 1987 and May 1989, average landfill prices in eastern Pennsylvania increased by 94 percent. During the same period, the increase in rates in central Pennsylvania and the northwestern part of the State were 111 percent and 143 percent, respectively. Average landfill

tipping rates in Pennsylvania for municipal waste increased by 119 percent between January 1987 and May 1989. The average increase in eastern Pennsylvania, was 94 percent.

217. Since August 1, 1987, all Essex generated non-hazardous solid waste has been directed to the Avenue A and Avenue F Transfer Stations. The waste types disposed of at the Transfer Stations are municipal waste (No. 10), bulk waste (No. 13), vegetative waste (excluding leaves) (No. 23), animal and food processing waste (No. 25) and dry non-hazardous industrial waste (No. 27).

218. Based on approximately 1,500,074 tons for the period August 1, 1987 to September 30, 1989, and the Transfer Stations operating five and one-half days per week over 113 weeks, the average daily waste flow through both Transfer Stations is approximately 2,550 tons. From August 1, 1987 through December 31, 1989, 1,736,396.27 tons of solid waste were disposed of and processed at the Transfer Stations. Of the total, 920,112.33 tons were processed at Avenue A; and 816,283.94 tons at Avenue F.

219. As found, the DEP anticipated a certain flow of tonnage to the Transfer Stations, and both Transfer Stations were issued permits and designed based upon the anticipated flow. After startup of the Transfer Stations in August of 1987, DEP personnel, including Wiley, determined that the amount of anticipated waste, and the amount previously disposed of by Essex at the Meadowlands Landfill was not being received at the Transfer Stations. As a result, the DEP continued ongoing investigations, as well as increased surveillance, in efforts to curtail any "diversions of waste." (Tr., Vol. 15, p. 79). These efforts included the eventual creation by the DEP, in early 1988, of a task force regarding "waste flow violations," which task force was formed during Wiley's tenure with the DEP, Ex. P-SWTR-1, P-23. The task force had the

mandate of providing a focal point for enforcement of waste-flow rules pertaining to the Transfer Stations and to coordinate enforcement activities among agencies.

220. From August 1987 until March 1988, the percent of waste-flow directed to the Transfer Stations was one of the lowest of any of the counties involved, approximately 50 to 60 percent, which range applied during Wiley's tenure with the DEP. In other words, the Transfer Stations received approximately 50 to 60 percent of the waste anticipated. The MPP waste flow of 2600 tons per day has never been achieved at Solid Waste Transfer's facility. Over the course of time, Solid Waste Transfer registered "numerous complaints" with the Board, the DEP, and the County regarding the situation, because of concerns that the decreased waste flow would place the company "in substantial jeopardy" regarding its contract commitments and make it difficult to generate internal cash necessary to support operations (Ex. P-SWTR-1, p. 26). As of August 1989, the flow had decreased to between 1,000 to 1,100 tons per day, and this average daily flow, which persisted at this level since approximately March 1989, was not reasonably expected to increase. As a result of its concerns and perceptions of a lack of "any serious waste flow enforcement by either the DEP or the BPU," Solid Waste Transfer engaged a private investigator to obtain information concerning alleged waste flow violations in the County, *Id.* p. 26. All of the information developed was made available to Essex, the DEP, and the Board. The problem of less than anticipated waste is particularly acute regarding Type 13 waste, which was directed only to Solid Waste Transfer's facility.

221. The $14.78 per ton initial rate paid by Solid Waste Transfer to 442 WMI was based on the costs to purchase equipment to process solid waste. In approximately November 1989, the charge was reduced to approximately $13.38 per ton. This change was made because the amount previously paid "was just too excessive for

SWTR to succeed." As found, it had been based on 2200 tons of waste per day, but the Avenue F Transfer Station never received that amount. (Tr., vol. 8, P. 119).

222. The Solid Waste Transfer facility is licensed for 2600 tons per day. Type 10 waste at the Solid Waste Transfer Station site averages approximately 500 tons per day; Type 13 comprises the balance, averaging 500 to 600 tons per day at the Transfer Station's "peak time." The level was substantially less as of January 1990. *Id.*, p. 116. The Transfer Station currently averages approximately 850 to 900 tons per day. Approximately 650 tons of this is composed of Type 10 waste, which is being shipped out because of the "put or pay" requirements with Chambers Development. *Id.*

223. Essex has not delivered the minimum 400,000 tons of Type 10 waste per year referenced in its contract with WMNJ. Avenue A received 920,112 tons of Type 10 waste from August 1, 1987 through December 1989. Based upon approximately 30,000 tons for January 1990, total tonnage over the life of the Transfer Station contract was 950,112 tons.

224. The Township of West Windsor and Browning-Ferris Industries of South Jersey, Inc. entered into a contract on June 1, 1988 for residential and commercial solid waste collection services. The rates in the contract are subject to adjustment in the second and third contract years based on the CPI-U index for New York for the most recent 12-month period ending 90 days prior to the new contract year, which adjustment shall not exceed 10 percent in any contract year.

225. Newark entered into a five-year contract, effective July 6, 1987, pursuant to bid with James Petrocello Co., Inc. for the collection and disposal of solid waste for approximately one-third of Newark. The contract provides for rate increases in the first four years.

226. On January 1, 1989, the Township of Aberdeen entered into a five-year contract for solid waste collection and disposal with Meadowbrook Carting Co., which contract provides for increases in charges for each year of the contract.

227. On June 6, 1989, the Borough of Runnemede and T.V. O'Connor Corporation entered into a three-year contract for the collection and disposal of solid waste, which contract provides for an increase in rates during each of the three years.

228. The Township of Mahwah opened bids on December 18, 1989 for a bid notice for five-year collection and disposal contracts. Only one bid was received, from Crystal Carting Corporation, which bid specified rates increasing during the first three years of the contract for those services for which a rate could be determined.

229. The City of North Wildwood entered into a three-year contract on December 12, 1989 with Filmore Construction Co., Inc., for the collection and disposal of solid waste, which contract provides that the rates charged will increase during each year.

230. The Borough of Montville entered into a three-year contract for solid waste collection and disposal on January 30, 1990, with Anchor Carting Corp., which contract provides for an increase in charges during each year.

231. Rates for the MCTS approved by the Board provide that for solid waste Types 10, 13, 23 and 25 there will be increases of 6.7 percent for 1990; 5 percent for 1992; 5 percent for 1993; and 5 percent for 1994. For solid waste Types 10 (special) and 27, the rates provide for increases of 8.6 percent for 1991; 6.9 percent for 1992; 2.5 percent for 1993; and 5 percent for 1994.

232. As of December 1, 1989, Essex collected transfer station tipping fees (including advanced call or tipping fee prepaid deposits, not yet tipped against) totaling

$179,650,400. The County paid total disposal costs of $85,847,100 and $82,908,000 to WMNJ and Solid Waste Transfer, respectively. As of December 31, 1989, $1,169,466.01 was payable to WMNJ for earned disposal charges; and $931,486.82, to Solid Waste Transfer.

233. As of December 31, 1989, Newark was paid host municipality benefits totaling $857,423.17, calculated on the basis of $.50 per ton of waste disposed of beginning January 1, 1988. Accrued host community benefits totaled $868,198.14 as of December 31, 1989.

234. As of December 31, 1989, the State of New Jersey received recycling taxes totaling $2,602,400 calculated at $1.50 per ton of waste disposed of at the Transfer Stations.

235. Pursuant to Article V(B)(3) of its contract with Essex, WMNJ noticed Essex of a 5.36 percent CPI increase for the year commencing August 1, 1988, and of an additional 4.6 percent CPI increase due and owing commencing August 1, 1989. WMNJ agreed to delay the first noticed increase until September 15, 1988.

236. WMNJ has billed Essex for a 5.36 percent CPI cost-of-living price increase effective September 19, 1988, which claim totals $530,498 for 1988, and $1,909,921 for 1989. WMNJ has claimed and billed the County for a $2.25 per ton Pennsylvania landfill tax surcharge effective October 1988, which claim totals $205,345 for 1988 and $857,475 for 1989.

237. Solid Waste Transfer has claimed and billed Essex for a 5.36 percent CPI cost-of-living price increase effective August 1, 1988, which claim totals $312,146 for 1988 for Type 10 waste, $704,178 for 1989 for Type 10 waste, $519,080 for 1988 for Types 13, 23, 25 and 27 waste, and $1,210,450 for 1989 for Types 13, 23, 25 and 27 waste.

238. WMNJ has claimed and billed Essex for a 4.6 percent CPI cost-of-living increase effective August 1, 1989, which claim totals $732,564 for 1989.

239. Solid Waste Transfer has claimed and billed Essex for a 4.66 percent CPI price increase effective August 1, 1989, which claim totals $273,244 for 1989 for Type 10 waste and $408,395 for 1989 for Types 13, 23, 25 and 27 waste.

240. Pennsylvania adopted a statute July 28, 1988, imposing a surcharge on landfill disposal for recycling, post-closure and host community taxes. Beginning in the fall of 1988, WMNJ paid $2.25 per ton for the surcharge and billed the County, claiming that its contract with Essex required reimbursement for such surcharges over and above the service fees. Essex has not paid the surcharges to date.

241. Essex has not paid WMNJ's and Solid Waste Transfer's claims for CPI increases.

242. Pursuant to the contract, if the County fails to remit service fees due and owing within 15 days, an interest charge of 12 percent may be assessed and recovered by WMNJ.

243. During the 30-month term of the contract, WMNJ cannot increase its charges to Essex beyond the fixed amounts stated in the contract, except for CPI increases.

244. Based upon total tonnage of 949,067 tons, between August 1, 1987 and January 31, 1990, WMNJ's effective charge to Essex over the term of the contract was $97 per ton. The County actually paid WMNJ $88,607,933, or $93.36 per ton over the life of the contract. A reasonable calculation of any amounts owing to WMNJ by the County relating to CPI increases, if such increases are found to be reasonable, is $3,454,000. A reasonable calculation of any amounts owing by Essex to WMNJ, if such amounts are owing because of a failure by the County to deliver a minimum of 400,000 tons

per year, is $4,841,930. A reasonable calculation of any amount owed by the County to WMNJ for reimbursement for Pennsylvania landfill surcharges, if such amounts are owing, is $1,065,764. The above referenced amounts do not include 12 percent interest charges on overdue payments, if such charges are applicable and owed by the County. A reasonable calculation of WMNJ's total contract claims against Essex, if all such claims are applicable and owing by the County, is $9,361,192, plus interest.

245. Because revenue recoveries are on a unit volume basis, financial viability of transfer station operations is highly sensitive to relatively small decreases in waste flows.

246. The County anticipates that transfer station operations will be phased out with the phase-in of operations of the resource recovery facility and that the resource recovery plant will dispose of approximately 70 percent of the waste presently going to the Transfer Stations. The County plans to have the Solid Waste Transfer facility remain in operation to process the remaining waste that cannot be processed at the resource recovery facility.

247. The Board included in the County's interim tariff rates, which were effective August 1, 1987, a $2.85 per ton surcharge to cover the costs of administrative activities performed by the County.

248 Transfer Station administration services performed by Essex, including initial start-up services, are and have been provided by the following County departments: Department of Public Safety, Division of County Police; Department of Public Works, Division of Fleet Management; Department of Planning and Economic Development, Division of Solid Waste Management; Office of County Counsel, and the Department of Administration and Finance. Administrative costs also include and have included outside contracts for management and legal activities.

249. Transfer station tipping fees are collected by Essex from private haulers on a prepayment schedule. Municipalities providing their own solid waste collection do not pay in advance, but pay pursuant to a voucher system whereby municipal vouchers are p???ded to the County in advance of tipping, with payment ?ade thereafter. Essex maintains a separate account for each disposal company and municipality, which account lists both funds received and charged. Collections are deposited in a "tipping fee operational account" which is under the direction of the County Treasurer (Ex-P.11, p.2). This account is dedicated by a rider to the County budget, which limits its source to tipping fee receipts, and it is used for payments to transfer station charges. Haulers are required to maintain a $1,500 minimum advance balance for compactor body trucks and a $750 advance balance for non-compactor body trucks. Disbursements are made from the tipping fee operational account to the following entities: the Transfer Station owners-operators, the County for payment of administrative costs, the State of New Jersey for taxes, and Newark for host community benefits. Essex's general supervisory responsibilities include collecting tipping fees for the Transfer Stations and the generation of monthly performance reports, tonnage statistics, billings and expenditures.

250. As of December 31, 1989, the County charged to the tipping fees total County administrative costs of $4,945,000. As of that date, Essex was holding tipping fees reserves of $3,683,300, plus earned interest of $788,800 on such reserves.

ARMS-LENGTH CONTRACT

The Staff argues that the Board explicitly stated in its February 10, 1989 order that the contracts were not let subject to competitive conditions, but were rather negotiated under the pressures of an emergency situation. Except for this reference, the Staff does not analyze the record in reference to the issue

of whether the contracts in question were the result of arms-length negotiations. Rate Counsel similarly does not address this issue. Intervenor argues that petitioners and respondent have failed to establish that the contracts were the products of arms-length negotiations in a competitive market. Essex, surprisingly, takes no position on the reasonableness of the contract service charges, noting that it seeks approval of an initial tariff that will provide for payment of whatever service costs are approved for WMNJ and Solid Waste Transfer plus its costs for supervision and administration. Solid Waste Transfer and WMNJ argue that the contracts were the result of arms-length negotiations in a competitive market.

Newark offered testimony of Stevens; WMNJ, Mullee, and Savas; and Solid Waste Transfer, Bicksler, relevant to this issue. Based upon a review of the entire record and the above findings of fact, I am persuaded that the overwhelming weight of the evidence supports a conclusion that the contracts in question were the result of arms-length negotiations in a competitive market.

Initially, I am not persuaded by the Staff's argument that the Board has already conclusively determined this issue. As discussed hereinabove, the Board has specifically left open the question of the standard of proof to apply in this proceeding, including as a possible alternative approach a competitive contract theory, as advanced by Solid Waste Transfer and WMNJ. The Staff mischaracterizes the Board's February 10, 1989. Referencing arguments made by WMNJ regarding the appropriate standard of proof in relation to a discovery motion, the Board noted that "There is no evidence *as yet* that the transfer station contracts at issue in this case were, in fact, negotiated at an arms-length basis in the competitive market." Decision and Order Upon Interlocutory Review, dated February 10, 1989, p. 4 (emphasis added) and the fact that the contracts were not the result of "competitive *bidding*," but were negotiated "under the pressures of an emergency situation." *Ibid.* (emphasis added). The Appellate Division has found that the contracts in question "were properly negotiated under the emergency bidding exception" to the Local Public Contracts

Law, *N.J.S.A.* 40A: 11-1 *et seq. Newark v. Bd. of Chosen Freeholders*, 221 *N.J. Super.* 558, 570 (App. Div. 1987) (*Board of Chosen Freeholders*).

There are no assertions or evidence of any collusion or relationship among individuals associated with the vendors and individuals who negotiated on behalf of the County. To the contrary, the evidence is compelling that the process, although in response to an emergency situation, was an open one. The findings of fact hereinabove articulated support the conclusion that County personnel, with the assistance of Karpinsky, an obviously objective participant, and staff expertise of the DEP, made great efforts, although under time pressure, to craft a Solicitation of Interest which would meet the needs of Essex for solid waste disposal, as well as anticipated DEP requirements.

By the time the Solicitation of Interest was issued, the County, as well as potential interested respondents, had had the benefit of the experience of the DEP's involvement with establishing transfer station programs in other northern New Jersey counties and the DEP's issuance of its own RFP. As found, County personnel, including Karpinsky, who was then on loan to Essex, were in constant communications with DEP personnel. These communications began prior to issuance of the Solicitation of Interest and continued throughout the period of consideration of the responses and final determinations. The Solicitation of Interest was widely advertised and was the subject of open meetings which, in fact, were attended by numerous representatives of the solid waste industry. The review of the responses, again although under time pressure, was exhaustive, both Grant and Karpinsky, independently rated them in a manner found to be reasonable. The County Executive and Freeholders also had the benefit of considered reviews of outside, independent consultants, as well as input from the DEP and the County Treasurer's office.

Contrary to the arguments of Newark, price, as well as the need to ensure dependable landfill capacity, was not an inconsequential consideration for Essex. The County's concern that

the ultimate determinations be consistent with the DEP's exacting environmental requirements were reasonable. However, the weight of the evidence conclusively demonstrates that price was a significant factor. The personnel involved had a knowledge of then prevailing rates in the New York metropolitan area. The cost estimates were reviewed by County personnel and were negotiated downward. As found, cost considerations were of substantial importance to Amato, who had been elected on a platform of fiscal prudence Contrary to Newark's assertions, the testimony of M. Mauriello, as well as other evidence, is persuasive that the Executive was a hard-nosed negotiator. The Executive's concern with uniform rates for Type 10 waste in order to avoid public perceptions of inequity was a reasonable one. The record does not support Newark's inferred argument that the County was, in essence, a captive victim of circumstances. The evidence demonstrates that Essex engaged in informed and intense negotiations regarding contract price. Price was an important facet of the review process and an important issue for the Executive. Karpinsky testified on cross-examination that in reviewing the responses to the Solicitation of Interest, he would have rejected Solid Waste Transfer as the vendor if he had concluded that its price was unreasonable, that is, if it had been significantly over market prices. As found, price proposals were compared with existing markets in the Long Island area by experienced County personnel. As brought out through M. Mauriello's testimony, the County negotiated one vendor against the other, with personal participation by the Executive, who, at the last meeting, presented a demand for a uniform price on a take-it or leave-it basis.

The proposals of the vendors ultimately selected, in addition to incorporating reasonable rates, were consistent with exacting requirements pertaining to environmental mandates and the availability of dependable disposal facilities. In light of the shortage of solid waste disposal sites in New Jersey and widespread perceptions of an impending garbage crisis, the proclamations of emergency by the Governor and the DEP, the CMGC report, etc., the County's requirement that there be secure, dependable transportation and disposal facilities, and

that the disposal facilities meet all environmental requirements and be in place prior to August 1, 1987, were reasonable and valid.

Newark places some emphasis upon an argument that the County put itself in an emergency situation because it unduly delayed prerequisite steps to implementing a transfer station program. I am not persuaded by this argument. The reasons for the prior administration's determination not to aggressively seek implementation of a transfer station program cannot be discerned entirely from the record, although the evidence, as reflected in the above findings of fact, suggests that it was at least partly due to a miscalculation of the DEP's response to requested extensions of the moratorium on Essex's reliance on the HMDC landfill. This perception may not have been completely unwarranted in light of the DEP's failure to impose its own transfer station process on Essex as it had done with other counties. In any event, as found, Amato's administration took immediate steps to implement a transfer station program subsequent to the November 1986 election. It is also noted that Newark's argument was rejected in the context of consideration of compliance with the statutory bidding requirements in *Board of Chosen Freeholders*. Intervenor argued in that proceeding that both Essex and the State 'have known for some years' "that the resource recovery facility would not be operational by the July deadline, and yet they delayed. . ." The Court, rejecting that argument, reaffirmed the principle that '(p)ublic bodies do not lose their Powers to respond to emergencies that would affect the public health, safety and welfare because prior governmental inaction may have contributed toward the emergency.' *Board of Chosen Freeholders* at 571 (citation omitted). Noting that ". . . the actions of the County, the State, the BPU, the Governor, and commensense, confirmed that this is an emergency situation requiring the immediate performance of the services, . . .," the Court also noted that Newark did ". . . not present anything more than a bald accusation that the County delayed this interim proposal so that in bad faith it circumvented the bidding requirements." *Id.* at 572. Similarly, in this case, the record does not support a finding of bad faith in the context of

the issuance of the Solicitation of Interest, consideration of the responses thereto, and the determinations regarding the final vendors chosen. It is also noted, parenthetically, that the evidence in this proceeding suggests that some of the delay in the establishment of the transfer station program was, at least in part, attributed to the opposition of Newark to the siting of such facilities within the City.

I am persuaded Essex's procurement process was competitive and yielded a competitive result. Stevens focussed in her analysis upon her conclusion that the County could have obtained lower costs for disposal and transportation services as an indication that the process and results were not competitive. Based upon my review of the record, I am more persuaded by the testimony of Savas than that of Stevens.

It is clear that the Solicitation of Interest was widely circulated in a market already sensitized to the service needs outlined in it, in part, because of the DEP's on-going RFP process. As WMNJ argues, it is reasonable to infer that vendors responding to the Solicitation of Interest would have been familiar with the DEP's RFP in light of the emphasis in New Jersey at the time in question on landfill closures and the State's intention to implement transfer station programs. Savas testified that the context in which the Solicitation was advertised would have made it obvious to anyone in the solid waste industry, and even individuals outside of that industry. In this respect, Savas noted his participation in 1985, even before the RFP issued, in a feasibility study for transfer station in Elizabeth, which proposal was made by a firm not, strictly speaking, in the solid waste business.

I am not persuaded by Stevens' emphasis in her testimony, and Newark's arguments in this respect, regarding the necessity for discussions with potential respondents as a necessary step in the competitive procurement process. As Savas testified, such a step may be useful where vendors are not knowledgeable regarding the services needed, or where there is inadequate experience on the part of the offering agency. Such circumstances did not apply in this case, where there

was widespread awareness of the State's solid waste disposal problems, and the market was "prime," that is, vendors could be expected to be prepared and experienced in relation to the Solicitation of Interest because of the DEP's RFP process, as well as the widespread dissemination of the State's goods of moving towards a transfer station program. (Tr., Vol. 30, p. 55). The step of initiating discussions with vendors may be useful in situations where the vendors are inexperienced, there is a desire to encourage new vendors to enter a field with which they are unfamiliar, or where there is inadequate experience in preparing RFPs and the offering agency may learn from the process itself. The Solicitation of Interest contained an adequate description of the scope of services for which proposals were being sought, a factor upon which both Savas and Stevens agreed is important for a competitive process. As Savas testified, this is necessary so potential respondents can know what is expected of them.

Similarly, I am not persuaded by Newark's position that the services in question should have been unbundled. The Solicitation of Interest encompassed several different services, as enumerated by Savas, which might have been unbundled. These included the siting of a transfer station, selection of a site, designing a transfer station, constructing the facility, operating a transfer station, hauling waste, and disposing of the waste. The hauling stage could further be subdivided into obtaining trailers and separately obtaining truckers to haul trailers. In theory, the bundled services requested in the Solicitation of Interest could have been unbundled. Savas testified in this respect that there is no necessary relationship between bundled or unbundled contracts and a fair market, reasonable contract price. I am also persuaded by his testimony that a bundled approach was better in the particular circumstances considered in this proceeding than an unbundled one and was also identical to the approach of the DEP in its RFP process. He noted that the entire burden would be on the contractor with a bundled approach, but that if the County were to separately select each of the pieces of service, ultimately the County would have borne the risk of insuring that all things worked well together. In addition, with an

unbundled approach, government itself bears the costs of managing and essentially functioning as a general contractor, a costly proposition. Efficiencies of scale or economies of scale and fewer transactional costs may also result from a bundled approach.

There is some evidence in the record, as WMNJ argues, relying on the experience in Hunterdon County, that an unbundled approach may lead to higher disposal costs. In any event, Stevens' assertion and Newark's argument that it would necessarily have been cheaper for Essex to have employed an unbundled approach are not supported in the evidence nor are they persuasive.

Judgment is also involved in the determination by the awarding authority as to whether or not it is best to negotiate price early in the process. In this case, the Executive determined not to commence contract negotiations until after the County Freeholders accepted the sites proposed by WMNJ and Solid Waste Transfer. Newark's argument that the process was necessarily defeated because the Transfer Station sites were included in the District Plan before the contract was executed is not persuasive in light of the entire record.. The fact that Solid Waste Transfer's Hill Street site was in the District Plan but has never been used evidences the fact that inclusion in the Plan did not necessarily mean that Essex had to execute a contract with WMNJ and Solid Waste Transfer nor that the vendors had a legal right to receive waste-flows. Waste-flow directives did not become final until adopted by the Board and the DEP, which did not incur until July 27, 1987, almost a month after execution of the contracts.

Both Savas and Stevens agreed in principle on the importance of articulating evaluation and weighting criteria. It is clear that the County adequately developed and articulated evaluation criteria, with the assistance of in-house expertise and that of the DEP. In this respect, I am persuaded by the distinction articulated in Savas' testimony between a request for bids, in which the required responses are already specified in great detail and the bidders simply state a price, and the

Solicitation of Interest, which was more in the nature of a request for proposals, which, in essence, sought to solicit a variety of different kinds of proposals, solutions to a problem. Evaluation weight can be more easily articulated with specificity in the former case than in the latter. In any event, the Solicitation of Interest itself identified the evaluation criteria which would be relevant. The evaluation criterion, in addition, were relevant and reasonable.

In an area as "volatile" as solid waste management, price alone would not be an overriding criterion, even for the letting of a public contract. *Id.* p. 62. Savas's included in his enumeration of relevant factors, the sentiment of public officials, as a reflection of public opinion, regarding the location of solid waste disposal facilities an obvious factor. Another important and equally obvious one, is the environmental acceptability of any sites incorporated in responses. This is especially so in the time context in which the responses to the Solicitation of Interest were considered, including "extraordinary liability circumstances" and the closure of landfills, *Ibid.* Location, environmental considerations, experience and the availability of committed out-of-State landfill space were all important factors, in addition to price, which had to be weighed in evaluating the transfer station proposals. In fact, price alone may not even be an overriding criterion for the letting of State contracts pursuant to bidding procedures, *See, Keyes Martin and Co. v. Director, Div. of Purchase*, 99 *N.J.* 244 (1985).

I am also not persuaded by intervenor's argument that a competitive procurement process is defeated by the fact that some respondents to the Solicitation of Interest could not meet certain of Essex's criteria. As brought out through Savas' testimony, it is not unusual to have proposals eliminated for such reasons in an RFP process. In addition, it is not unusual, nor contrary to the nature of a competitive procurement process, that ultimate negotiations are conducted with as few as two potential vendors. As Bicksler testified, the fact that all potential providers did not choose to respond to the Solicitation of Interest does not mean that the market was not competitive

because there were market profit opportunities for all without barriers to entry. Although there are no hard and fast rules regarding a minimum amount of responses required for competitiveness, nine respondents is a "healthy number." *Id.*, p. 60.. There is nothing in the record to even suggest that potential vendors were or might have been discouraged by Essex's process. Initial evaluation by Smith and Karpinsky of the first nine responses, with a narrowing of acceptable responses through evaluation of different features of the proposals, as well as the negotiations regarding contract price, are indicia of a competitive procurement process. As Bicksler testified, which testimony is not generally disputed by the other parties, a competitive market is one in which there is open competition without legal or other insurmountable barriers to entry. The number of successful vendors in the DEP's RFP process and the nine responses to the County Solicitation evidenced the existence of such a market. I am also not persuaded by arguments that the competitiveness of negotiations was lessened because Essex initially envisioned that successful vendors would charge tariff rates accepted by the Board, a position later changed in the process. WMNJ's argument that it is the nature and the result of negotiations that are important, not their timing, has merit.

Bicksler's testimony on behalf of Solid Waste Transfer that the market in which negotiations were initiated was competitive is supported by other evidence in the record. In this respect, I am persuaded by his testimony that there was an opportunity pool of many bidders, no entry barriers, and no monopolistic power on the part of potential bidding firms. The fact that the County Solicitation of Interest was widely circulated is an important factor. As Bicksler noted, the opportunity set for potential bidders included parties who were operating privately owned licensed transfer stations in Essex at that time. He defined barriers to entry as cost impediments for new firms that are analyzing entrance into an existing market. From this perspective, the market was clearly competitive, although some licensed providers and other potential respondents did not formally respond to the Solicitation of Interest. Solid Waste Transfer, in particular, was not an

incumbent firm and possessed no economic advantage related to barriers of entry. The thrust of the evidence and Newark's reliance thereon supports Solid Waste Transport's argument that intervenor's position regarding a lack of a competitive market is based upon the fact that Solid Waste Transfer and WMNJ, by proposing the best sites and adequate disposal capacity, disrupted the competitive balance of the market. A logical extension of such a position is that there can never be a competitive market for services when any proposal is technically superior to others. Mullee testified in this respect that a barrier to market entry exists only when there is a complete inability by other vendors to meet a market-wide criteria and that a business judgment not to do so does not create a barrier to entry. Bicksler defined a barrier to entry as a cost impediment for new firms analyzing entry into the market that would prevent them from meeting a criterion of the market. Such barriers are cash-flow factors or considerations creating pricing advantages for incumbent firms. Solid Waste Transfer, in particular, was not an incumbent firm with economic advantages related to barriers to entry. In addition, Newark's analysis focuses on the respondents to the Solicitation of Interest, rather than on the market at large. As Bicksler testified, the competitiveness of the product was not destroyed because some vendors did not respond to the Solicitation of Interest. At best, the DEP's RFP process and the attendant publicity encouraged competition in the transfer station market.

The negotiations between Essex and the vendors in question, as well as the ultimate contracts, occurred within the context of the DEP's prior RFP process. As Solid Waste Transfer argues, the RFP established general ground rules governing the County process, but Essex's Solicitation of Interest was tailored to its needs based upon the DEP's experience. The RFP process creased an opportunity for private sector parties to become involved in the solid waste industry, which opportunity was broadened by the County's Solicitation of Interest proceeding. The record clearly establishes that Essex and the DEP coordinated their efforts and expertise in securing transfer station services for the County. As brought out in Wiley's testimony and reflected in the above findings

of fact, the DEP's RFP was widely circulated and subject to a great deal of media attention, resulting in at least 50 individuals, representing an unknown number of companies, attending the DEP's pre-bid meeting. The DEP received numerous proposals for the Union, Passaic, Morris and Somerset County transfer station projects throughout August and September 1986. Many of these respondents became involved in the Essex County project proposal process. No rejected vendor expressed dissatisfaction with the County's process. The reviews conducted by Smith and Karpinsky were, as found, reasonable and objective.

Stevens acknowledged on cross-examination that the process followed by the County, given the deadline imposed, began in a fairly competitive fashion. She noted in this respect that Essex solicited responses from a large number of firms and received a "large number of responses." (*Tr., Vol. 27, p. 139*). The fact that nine was a respectable number of responses was acknowledged by Stevens on cross-examination. Stevens stressed, however, that the next step in the process is where Essex deviated from a competitive procurement process. Fundamental to this conclusion was her opinion that the County evaluated the responses and awarded contracts based only on consideration pertaining to site. This assumption is unsupported by the weight of the evidence, as reflected in the above findings of fact. Although Smith and Karpinsky focussed upon the technical aspects of the proposal at the initial stages, price was an integral component. The rating sheets developed and used included a review of a vendor's proposed price, where the respondents were able to quantify price at that point in the process.

The record also establishes that key participants in the evaluation and review process were well aware of prevailing comparable rates at the time in question. In addition, as, found, Amato, who controlled the negotiations, was extremely concerned with cost considerations. The initial price proposals were well within the market range and were subsequently negotiated downward by approximately 10 to 15 percent. I am especially persuaded by M. Mauriello's testimony

regarding the stringent bargaining stance taken by Amato on the last day of negotiations. Although Stevens testified that the County's award process created two monopolistic entities which exploited their status during negotiations, she acknowledged on cross-examination that she did not have full information regarding the circumstances of the negotiations or the fact that Amato took a "take it - or leave-it" price stance on the last day of negotiations on which contracts were executed. On the day the vendor contracts were executed, Solid Waste Transfer had already assumed exposure on its contracts with Glopak, Chambers and MIS. There is no argument nor hint in the record that there was any collusion nor affiliation between WMNJ and Solid Waste Transfer at the time of negotiation of the contracts. The fact that the contracts are in all legal respects, including price, the same adds credence to the arguments that the County bargained with the successful vendors effectively.

Stevens' testimony and reliance upon conjecture as to what efforts the County might have taken to aid vendors by providing a site acceptable to Essex further lessens the weight to be given to her testimony. On cross-examination, Stevens acknowledged that this factor might not have made a difference in whether or not the process was a competitive one and did not directly respond when asked whether or not such actions by the County might have constituted favoritism to a particular vendor. Ultimately, although Newark relies on Stevens' testimony in support of an argument that the County did not secure the lowest possible price for transfer station services, Stevens, herself, generally concluded only that it was possible to transport and dispose of waste at prices less than those agreed upon by Essex. As Solid Waste Transfer notes, Stevens did not specify a particular procedure which she was advocating that Essex should have followed, and, in fact, testified on cross-examination that a competitive procurement procedure would not necessarily result in lower prices than what she referred to as a negotiated procedure. Although Steven testified that one alternative the County could have pursued was to select a site and then have competitive procurement regarding operations, she testified on

cross-examination that she was not "espousing" such an approach as one which Essex should have followed, although it was "an alternative that might have worked." (Tr., Vol. 27, p. 146). She was similarly unspecific regarding how Essex should, or would, under such an approach, have procured landfill availability.

As noted hereinabove, Stevens' analysis focussed on transportation and disposal costs. However, she did not compare transportation costs incurred to costs for such services procured through a process she would deem to be competitive, In fact, Stevens had no specific reference to overall price which resulted from a satisfactory procurement process for transfer station services. Stevens criticized Essex's reliance on market disposal rates established by experience in Long Island, because, in her view, it was not an effective method of evaluating price because there was no analysis of whether such contracts were competitively procured. However, she compared Solid Waste Transfer's disposal and transportation costs with those of WMNJ because of her conclusion that the latter represented "a good number." (Tr., Vol. 27, p. 166). The inconsistencies in the analysis are highlighted by Stevens' testimony on cross-examination that she did not know whether or not WMNJ's transportation agreements were competitively procured when she relied on them to analyze Solid Waste Transfer's costs. Stevens also did not make efforts to determine if a price comparison with other New Jersey transfer stations would have been valid, in her view.

Stevens testified on cross-examination that she had no basis to believe that WMNJ's transporters would have negotiated for the same price with another entity. There is therefore no basis for an evaluation of a transportation price to Solid Waste Transfer's disposal sites by reference to WMNJ's fees. In addition, her reliance on WMNJ's original transportation agreement to construct a price for transportation services in excess of 300 miles did not account for contract language guaranteeing ten loads per vehicle every week. Stevens' calculations and reliance on WMNJ's original transportation agreement also were based upon misconstruction of

application of the per mileage rates. Stevens was not aware that the DEP's RFP process resulted in other transfer station programs being established in northern New Jersey, though she was aware that transfer stations existed in northern New Jersey, at least in mid-1987; however, she testified that she did not consider such programs and their attendant costs in terms of a comparison because she could not determine if the prices for those transfer stations were the result of a competitive process.

Mullee's testimony that a failure to meet Essex's criteria created a barrier to success, not a barrier to entry, is persuasive within the context of the facts of this case. Although intervenor's arguments regarding the effects of the awarding of the contracts, before setting the price cannot be dismissed lightly, it does not entirely reflect the situation. However, the fact that vendors' sites had been incorporated in the District Plan certainly requires scrutiny to insure that the prices were not the result of such unequal bargaining power that they resulted in unreasonable rates. Based upon a careful review of the record, I am persuaded that the overwhelming weight of the evidence demonstrates that they were not. The evidence clearly demonstrates that Essex was convinced of its equal, if not superior, bargaining power and that it exercised such. In addition, prior to execution of the contracts, WMNJ and Solid Waste Transfer arguably had no legal rights or assurances that the County would agree to any contracts. There were no guarantees at that time that waste-flow directives would be established. The two successful vendors did not have the only potentially usable sites, but, as made clear by Smith's testimony, had the sites which, on a comparable basis, considering price, were deemed to be preferable by the County. Newark's focus on the final day of negotiations ignores the history of the drafting of the Solicitation of Interest and evaluation of the responses thereto, a process in which price was an important facet.

I am also persuaded by WMNJ's analysis that other considerations in addition to price are legitimate ones regarding landlfill designations. For example, environmental risk

considerations are apparent, as are questions of capacity. Testimony offered that back-up capacity is desirable because of landfill closure experience is persuasive. Transportation costs are, as indicated, also relevant, the lower price landfills generally being located farther away from the population centers of New Jersey. Considerations of number of trailers, towing and repair expenses, etc., are all considerations. Although affiliated transactions must generally be closely scrutinized, especially in a non-contract setting, testimony offered on behalf of WMNJ regarding some benefits of using an affiliate landfill was persuasive. One factor to consider is ensuring an efficient transaction without interruptions of service, as well as adequate backup capacity at other landfills. More control on environmental and liability factors can also be achieved.

The competitiveness of the process is also evidenced by a review of the contracts themselves. As Waste Management argues, it is clear that the agreements were executed by unaffiliated parties with apparent distinguishable economical interests and can therefore be deemed to be the result of arms-length negotiations. As brought out through Bicksler's testimony, the contracts evidence an exchange of benefits, thereby reflecting equal bargaining power. Such a conclusion is, as indicated, apparent from a review of the specific contract terms. WMNJ, for example, was obligated to construct the Avenue A facility on an emergency basis and to absorb any unanticipated cost overruns. The company was also obligated to provide transfer station services for 30 months at a fixed-price, with annual increments in service fees limited to a percentage of CPI increases, if any. The evidence establishes that it assumed the risk of operational cost increases, including cost escalations for out-of-State transportation and disposal. In this respect, I am persuaded by Savas' testimony that contracts excluding change-of-law costs recovery are very unusual. As alluded to by Savas, such change-of-law costs are passed through in the City of Philadelphia's contract with G.R.O.W.S. Landfill, as well as in Mercer County's contract with G.R.O.W.S. Solid Waste Transfer assumed obligations and risks similar to those of respondent.

Savas' analysis that the competitiveness of the contract terms is indicated by a comparison of the service fees with others in the New Jersey/New York metropolitan area is supported by the evidence in the record. A comparison approach is, as Savas testified, a typical one. The contract prices, even with CPI increases, are lower than any in New Jersey for comparable transfer station services, that is, for services which do not include charges subsidized by up-front purchased landfill airspace. Even with the addition of the County's billing costs, the charges, for example, are among the lowest effective rates in the State. Under the fixed price contracts, the vendors assumed the risks of any future increased costs, such as cost overruns for emergency construction, emergency mobilization of equipment, and any increased costs to insure uninterrupted transport and disposal of waste. The County also had the option, as WMNJ argues, to contract only with Solid Waste Transfer. As noted, the fact that the Orange site was never used evidences that inclusion in the Plan did not dictate the County's use of a facility.

As found, the County's adjustment to account for greater distance from Long Island to Pennsylvania disposal sites and tolls was a reasonable one. The service fees compared favorably with market prices then prevailing in 1987. Even with inclusion of the $.09 per ton projected for 1989 by the County for its Department of Administration and Finance as imputed recovery for billing costs, both contracts are, on their face, reasonable when compared with similar ones. Without belaboring the point, it is noted that the record in this respect is accurately reflected in WMNJ's proposed findings of fact regarding price comparisons (initial brief, pp. 109-111).

Newark misstates the positions of Solid Waste Transfer and WMNJ regarding the use of comparative data. Both parties rely upon arguments that the transfer station rates are reasonable because the contracts were negotiated at arms-length in a competitive market, not simply because the rates compare favorably with tipping fees. Rate comparisons are referenced in reliance upon an argument that such an analysis demonstrates the competitive interactions of the transfer station market and

provided safeguards to the consumers of Essex. In fact, the Board has referenced a comparative rates approach in support of findings that transfer station rates were the result of a comparative market, *See, e.g.*, Ex. WMNJ-55, p. 2.

I am also persuaded by the analyses advanced by Solid Waste Transfer and WMNJ that the cost of living increases, within the context of fixed-price multiple year contracts, and considering the specific contracts from a competitive procurement process, are reasonable. Newark's arguments in this respect are largely based upon a hindsight approach. The are also based upon the assumption that Board policy precludes any cost of living clauses in contract situations, an assumption contrary to policy as reflected in the record and arguments in this case. Newark's arguments are based upon rate base/rate of return proceedings, not, as WMNJ argues, contract situations. The contracts in question contain cost escalators which are more limited than those found in other solid waste disposal contracts, as evidenced in the record. As discussed hereinafter, I am not persuaded that a rate base/rate of return approach is justified in this proceeding. Again, WMNJ's analysis not reflect firm prices for out-of-State disposal. There was flexibility in the DEP process for finalizing costs as construction proceeded. There were also material changes in the initial proposals. WMNJ's initial proposal, for example, contemplated a three-year rail and bale operation, receipt of 2,000 tons of waste per day, a franchise to guarantee waste flows, and a non-emergency, phased-in construction program. The contract, in contrast, obligated an emergency construction program to ensure that the Avenue A facility was fully operational in a month, over-the-road transportation of waste to out-of-State disposal sites, the processing of less waste per day over a shorter period of time, a franchise to Essex, a fixed contract price, and shifting significant risks of increased costs over the terms of the contract to the vendor. As brought out through the evidence offered on behalf respondent, such changes would likely result in a higher price.

Newark places much emphasis upon Stevens' analysis that a less costly shipping pattern could have been employed by

the County as an indication of the lack of a competitive process. I am especially not persuaded by this argument. As brought out through evidence offered on behalf of respondent, an economic, incentive exists for the vendors to operate at optimum efficiency in light of the fixed price nature of the contracts. Newark's position essentially is based upon the proposition that a lower cost shipping pattern involving more consistent use of more distant disposal sites in Pennsylvania is possible. This contention is unsupported in the record. To the contrary, as brought out through Savas' testimony, longer hauls would likely be more costly. I am also persuaded by Savas' testimony regarding the reasons why a hauler would, in general, prefer proximity of the ultimate landfill disposal site to a transfer station. The fact that transportation costs would tend to be lower the closer to the disposal site reflects lower costs associated, for example, with dealing with breakdowsn of vehicles, which are inevitable. Feasibility of repair, as well as availability of replacement truck equipment, in order to adhere to the terms of hauling contracts, are implicated in this respect. Pursuant to the terms of WMNJ's transporter agreement, more frequent trips to more distant disposal sites, a pattern assumed in Newark's positions, would most likely be foreclosed. In addition, as brought out through Savas' testimony, longer hauls. on a more consistent basis generally result in higher costs than shorter hauls, including higher capital costs for trailers and increased maintenance and tire expenses. These considerations were not taken into account in Newark's analysis.

The contract recoveries for disposal costs are also on their face reasonable on a comparative basis. Contract disposal costs were within the range of landfill charges in eastern Pennsylvania between January 1987 and January 1988. Even with 5.36 percent and 4.66 percent CPI increases, contract charges by WMNJ for disposal costs are reasonable on a comparative basis. In this respect, WMNJ's proposed findings accurately reflect the record (initial brief, pp. 111-114.) Intervenor relies to a great extent in its arguments in this respect on the affiliated nature of the landfills and Chambers Development. Although it is clear that such affiliated costs must be

closely scrutinized if a rate base/rate of return approach is utilized, as well as considered in reviewing the reasonableness of the contracts in question, a comparison of disposal costs of New Jersey transfer stations which resulted in non-affiliated situations demonstrates that the transport and disposal cost reflected in the contracts are reasonable. Contract recoveries for disposal costs were not only within the range of market prices as evidenced by comparable costs incurred at other facilities in New Jersey, but also by data on landfill prices published by the PADER.

The CGCM report recognized that transfer station usage would have concomitant high cost per ton for out-of-State disposal. As noted, it also acknowledged the threat that Pennsylvania, upon which New Jersey was then highly dependent for disposal, might at any time curtail waste from out-of-State. The fact that Pennsylvania attempted to do so in 1987 emphasizes the risks associated with the transfer station program at execution of contracts. As found, the PADER issued an order limiting disposal at the Keystone Landfill in early 1986. Pursuant to the DEP's analysis, the motivation was to restrict New Jersey's reliance upon Pennsylvania landfills. In 1987, Pennsylvania proposed regulations to limit the daily volume of waste disposed at landfills. Ensuing litigation caused a disruption in Solid Waste Transfer's contract with Chambers Development and, in turn, Chambers Development's ability to dispose at Chambers landfills in the Pittsburgh area. This, as found, resulted in renegotiation of Solid Waste Transfer's agreement with Chambers, and the renegotiated contracts included put-or-pay provisions and payment of Pennsylvania surcharges by Solid Waste Transfer. The uncertainties associated with reliance upon out-of-State landfill was also recognized by the DEP when it established the RFP process. At that time, long-term contracts for long-distance transfer of waste was a new concept. The risks associated with such haulage were evidenced by Solid Waste Transfer's subsequent problems with the MIS contracts. As discussed hereinabove, the Board also acknowledged waste-flow problems and the associated risks thereof in its approval of initial tariffs for Pen Pac. Respondents to the RFP process advised DEP

that waste-flow directives were not alone sufficient to offset risks and obtain financing for transfer stations. This situation emphasizes the fact that contracts guaranteeing revenues were needed, especially in light of the fact that revenue recoveries are on a unit volume basis, making financial condition highly sensitive to decreases in waste-flows. Based upon the Transfer Stations' experience, it is apparent that waste-flow regulations themselves are not a particularly reliable protection against reduction in anticipated waste-flow. As found, the DEP eventually concluded that financing might not be available without some commitment from counties beyond their District Plan roles. As Solid Waste Transfer's experience demonstrates, conventional financing is not easily obtained for such projects.

Within this context, I am persuaded by Bicksler's testimony regarding the risks to which Solid Waste Transfer was exposed pursuant to the contract, which risks would also apply to WMNJ. They included, in Solid Waste Transfer's case, new enterprise risks. For both vendors, the risks included regulatory risks, change of law risks, force majeure risks and litigation risks. Although a hindsight approach should not be utilized, it is clear from the evidence that these risks were real ones, not only at the time the contracts were executed, but as proven by subsequent events. Waste-flow risk was, in particular, a substantial one, given the high sensitivity of the revenues of the vendors to small decreases in solid waste. This risk was borne by the vendors. New enterprise risks, which relate to a lack of predicted benchmarks regarding cash flow, were significant because of the unique nature, at the pertinent time, of the operations contemplated, included the uncertainty of transportation and disposal cash flows and the uncertainty of capital equipment. This risk is evidenced by unsuccessful efforts to raise capital from traditional sources. Regulatory risks were obvious and included that the requirement that specifications for equipment, construction, etc., had to be submitted to the DEP for approval. Change of law risks included such reasonably contemplated factors as changing tipping fees, changing availability of landfill space, changing mileage requirements and associated costs, all of which could

be expected to adversely affect cash flow. Change of law risks were not reimbursable unless the costs increased by more than ten percent and could be attributed to change of law risk. Force majeure risk relates to unforeseen or unanticipated events increasing cash flow outlays, including unfavorable weather and road conditions, etc. Litigation risk is related to possible environmental litigation, including possible clean-up liability. In this respect, Newark's arguments and evidence that such risks did not reasonably exist at the time the contracts were executed defies credibility. As noted in Bicksler's testimony, risks somewhat more specific to Solid Waste Transfer included those pertaining to capital structure and default, uncertainty regarding the price of landfill contracts and the availability of solid waste trailers, and uncertainty regarding the status of the Transfer Station site after five years.

As indicated, I am not persuaded by the evidence offered on behalf of the other parties on this issue. Cotton, who testified on behalf of Rate Counsel regarding general methodologies which are appropriate in this proceeding, did not review the contracts in question for overall reasonableness. His testimony that a contract price can be reviewed in isolation from the other terms of a contract is not supported by the overwhelming weight of the evidence in this record. This is especially so in light of the concerns of the DEP, as well as County officials, for environmental safeguards and the availability of landfill space. As brought out through Bicksler's testimony, competitive arms-length negotiations will result in a risk-sharing allocation among parties which impact upon the cost of services provided. Even Rothchild, who testified on Rate Counsel's behalf regarding cost of capital, acknowledged on cross-examination that as a general matter, there is no reason why the Board cannot judge the reasonableness of contracts considering the various contract terms, and that the terms of contracts influence the risks reflected therein.

I am also not persuaded by Newark's arguments that contract rates should be standardized for all waste types. Solid Waste Transfer's contract with Essex regarding non-Type 10 waste was, as discussed, part of the entire contract, which was

negotiated at arms-length in a competitive market. In addition, the record establishes that residual waste requires either special or additional permits or special processing, often the case when waste is destined for out-of-State landfills. The record also establishes that higher rates for non-Type 10 waste is typical in New Jersey and that Solid Waste Transfer's rates compare favorably.

The record also demonstrates the reasonableness of the administrative charges reflected in the tariff rates. Enforcement activities undertaken by the County are a reasonable exercise of its obligations in light of the fact that the transfer station routes were approved by the DEP and are established in the District Plan. Similarly, enforcement of truck weight limitations and other motor vehicle requirements is a reasonable exercise of the police power. As the County argues, although such functions might be fulfilled by the State and intervenor, such services are not otherwise being performed and the County's exercise of discretion to include an active enforcement effort as part of the transfer station program is reasonable. Essex has reasonably allocated the costs of County personnel and equipment used in management and administration of the transfer station program. The proposed initial tariffs reflect, as discussed, reasonable contract service costs plus the allocated costs of County services.

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**:

251. The contract between Essex and Solid Waste Transfer was the result of arms-length negotiations in a competitive market.

252. The Contract between Essex and Solid Waste Transfer is, in its entirety, including the automatic adjustment clauses, reasonable.

253. The contract between Essex and WMNJ was the result of arms-length negotiations in a competitive market.

254. The contract between Essex and WMNJ is, in its entirety, including the automatic adjustment clauses, reasonable.

STANDARD OF PROOF

Using a rate base/rate of return approach, the Staff recommends a revenue requirement in the amount of $91,277,187 for the 36 months of Solid Waste Transfer's contract. This position is apparently based upon calculation of operating expenses, although the Staff notes that revenue requirement is inclusive of profit. Based upon Solid Waste Transfer's 1987 and 1988 Annual Reports and an analysis of documents in evidence regarding 1990 revenues, the Staff calculates total revenues for the contract period for Solid Waste Transfer of $102,219,238. The Staff recommends an average rate for Solid Waste Transfer in the amount of $90.96 per ton, a decrease of $10.72 in Solid Waste Transfer's average tonnage rate (computed at $101.68) and recommends a decrease to Essex, for ultimate refund to customers, in the amount of $10.72 per ton, with interest. The tonnage calculated by the Staff for the contract period is 1,005,261. The Staff presumably advances a refund totaling some $10,000,000. The Staff does not detail the amount of interest which it proposes should be calculated on the refunds.

The Staff also calculates an average service fee of $93.20 per ton for WMNJ and recommends a reduction of $3.657 per ton, resulting in a service fee per ton of $89.54. It also calculates a refund of $5,506,738.58 for the first contract year; $1,391,531.36 for the contract year August 1, 1988 to July 31, 1989; and $690,720.66 for the contract year August 1, 1989 to January 31, 1990. The Staff therefore recommends a total refund by WMNJ of $3,588,990.60, subject to interest, which interest is not calculated. The Staff calculates an administrative cost for the County of $2.57 per ton.

Newark argues that WMNJ's management fees should be disallowed entirely and that its transport and disposal expenses should be disallowed to the extent they exceed the level of expenses for services which WMNJ would have

occurred if there had been, consistent with intervenor's position, a competitive procurement process. For the contract period, Newark proposes to disallow a total of $3,544,244 for management fee payments. Stevens concluded that in 1988, WMNJ's expenses were greater than they could be expected to have resulted from a competitive procurement by between $4 and $8.70 per ton for the period August 1, 1987 until December 31, 1989, and by between $2.07 per ton for the calendar year 1989. Taking the mean of these ranges, and multiplying by tonnage for each period, Newark calculates a refund of $5,266,248.43 by WMNJ. Based upon these positions, Newark calculates a final rate for WMNJ for the contract period of $83.79 per ton, $8 more than WMNJ's original proposal of $75.85 per ton, and based upon these figures, Newark recommends refunds for the contract period by WMNJ totaling $8,814,764.10.

Newark proposes that allowable rental expense, pursuant to a rate base/rate of return approach, for Solid Waste Transfer be $129,000 yearly, the fair market value as determined by Lasser. Newark therefore calculates a total refund pertaining to rental expense of $1,991,750 for the period August 1, 1987 through March 31, 1990. Stevens concluded that Solid Waste Transfer's transportation and disposal costs for Type 10 waste can be expected to have been $12 per ton less than they were had there been what she deemed to be a competitive procurement. Newark argues that Solid Waste Transfer's transportation and disposal expenses should be disallowed by $12 per ton, resulting in a refund of $10,645,701 for the period August 1, 1987 through March 30, 1990. Intervenor also proposes that allowable expense for EWP services should be reduced, at a minimum, by $3.62 per ton, resulting in a refund of $3,211,453 for the same period. Based on these adjustments, intervenor concludes that the rate for Type 10 waste should be $78.43 per ton and that this rate should apply to all non-Type 10 waste as well.

Incorporating a County administrative fee of $2.09 per ton, a host fee of $.50 per ton (which amount Newark argues should be subject to any increased host benefit payments

authorized by the Board), and taxes of $1.50 per ton, Newark computes a final tipping fee of $90.88 for WMNJ and $8.02 per ton for Solid Waste Transfer. Finally, Newark argues that WMNJ be ordered to provide refunds totaling $8,810,542; and Solid Waste Transfer, $15,848,904 (for waste disposal prior to April 1, 1990). Newark also argues that Solid Waste Transfer's prospective rate should be $78.43 per ton.

Rate Counsel does not make any specific proposals nor advance any analysis regarding the reasonableness of particular revenue requirement factors. Rate Counsel simply argues that Solid Waste Transfer's lease with Glopak should be carefully scrutinized, as well as its payments to EWP, and that a consolidated rate base is appropriate for the Transfer Stations, which rate base should include all utility plant owned by the Transfer Stations themselves or by an affiliate, with values determined at original costs. However, noting that the Transfer Stations should provide all information needed to calculate an appropriate rate base, it does not advance a rate base calculation. Rate Counsel did not respond to this Judge's above-referenced letter of July 11, 1990 and sets forth no recommended revenue requirement nor tariff rates for either Transfer Station. Rate Counsel argues that petitioners and respondent be required to provide information which it deems to be essential, but does not specify the form nor mechanism pursuant to which it proposes such information be provided. Rate Counsel also does not set forth any analysis nor position regarding the reasonableness of the County's service charge.

The Staff, Newark and Rate Counsel assume in their briefs that a rate base/rate of return approach in this proceeding is the most appropriate methodology and is, in fact, required. Rate Counsel presents no arguments in its brief regarding this issue, advancing a cursory nine-page rate base/rate of return analysis. The Staff advances conclusionary arguments. Newark's position is more fully developed in this respect, relying substantially on its analysis that the contracts were not the results of arms-length negotiations in a competitive market. As discussed hereinabove, I am not persuaded by that argument.

Both Newark and the Staff assume that the Board has definitively previously ruled in this proceeding that a rate base/rate of return approach must be used. This is clearly not the case. In its February 10, 1989 Decision and Order, the Board stated in pertinent part:

> As Newark argues, in *Saddle River* the Supreme Court approved the Board's interpretation of *N.J.S.A.* 48:13A-7 as authorizing the Board to review municipal solid waste contracts, even those awarded after competitive bidding under the Local Public Contracts Law, and to "modify them if it finds the rates are not reasonable." 71 N.J. at 24. Municipalities, said the Court, "are protected against the possibility of extortionate or excessively high bids by the regulatory authority of the Board of Public Utilities Commissioners." *Id.* at 24-25. Of course, the Board's regulatory authority over rates is normally exercised through rate base/rate of return analysis and decision. *See, e.g. In re Proposed Increased Intrastate Indus. Sand Rates*, 66 N.J. 12, 21-23 (1974); *In re Petition of Public Service Coordinated Transport*, 5 N.J. 196, 224-225 (1950).
>
> In *Saddle River*, the Court also stated, at 71 *N.J.* 25-26:
>
> In the normal course of events, the PUC may rely on the interactions of the market place to give rise to reasonable rates. Where this competitive protection fails, the PUC in its discretion may require the contractor to demonstrate the reasonableness of its rates.
>
> Newark correctly argues that nothing in Saddle River requires the Board to rely solely on "the interactions of the market place." To the contrary, that case authorizes "the PUC in its discretion [to] require the contractor to demonstrate the reasonableness of its rates." This is precisely what the Board did in its August 5, 1988 *Decision and Order* and

> reaffirmed in its September 14, 1988 *Decision and Order*, when it required the Transfer Stations to provide "facts and figures possessed by them pertaining to their operations."
>
> *The record in this protracted case* does not support WMNJ's position that the Board should ignore traditional rate base/rate of return analysis and-rely exclusively on the theory that the contracts were negotiated on an arms-length basis in a competitive market. Rather, *it supports the conclusion that the case should go forward under both approaches, and, when all the evidence is in, a judgment be made whether one or the other or, possibly, some combination of them be applied to determine whether the contracts' fees or charges are just and reasonable.* Decision and Order dated February 10, 1989, pp. 3-4 (emphasis added).

The Board's holdings regarding the standard of proof are consistent with statutory and other law of the State. The Board has jurisdiction over solid waste entities pursuant to both its general grant of jurisdiction, *N.J.S.A.* 48:2-13, (*Supp.* 1990), and pursuant to the Solid Waste Utility Control Act of 1970 (Act), *Id.* §13A-1 *et seq.* Pursuant to its general jurisdiction, the Board may require every public utility to file with it complete schedules of rates, *Id.* §2-2l, and may, after hearing, fix just and reasonable rates whenever it determines that any existing rate is unjust, unreasonable, insufficient or unjustly discriminatory or preferential, *Id.* §(b).

Whenever a public utility increases an existing rate, the Board, after hearing, may determine whether such increase is just and reasonable, *Id.* §(d). The requirement that the Board use a rate base approach when it arrives at any determination of the justness or reasonableness of any existing rate is not set forth specifically in the applicable statutes, but is stated in the negative. *N.J.S.A.* 48:2-21.2 sets forth those circumstances in which the Board is not, in such a case, required to find a rate base.

The Board is specifically empowered pursuant to the Act, upon complaint or its own initiative, after hearing, to direct any person engaging in the solid waste industry to furnish proof that the charges or rates to be received for such service do not exceed just and reasonable rates or charges. If the Board finds such charges are excessive, it may order the person charging such rates or charges to make an adjustment in a contract to a level which shall result in just and reasonable rates or charges. *Id* §13A-7.

N.J.S.A. 48:13A-7 must be read in *pari materia* with statutory provisions requiring a rate base approach to the determination of just and reasonable rates, *In re Application of Saddle River*, 71 *N.J.* 14, 25 (1976). (*Saddle River*). In making that the determinating the Board may reasonably be expected to rely upon the end result of an arms-length negotiation resulting in a contract:

> In extending public utility statutes to solid waste collectors by the passage of the Solid Waste Utility Control Act, the Legislature in *N.J.S.A.* 48:13A-7 set forth a procedure for approval of solid waste collection contracts which carved out an exception to the general rule of *N.J.S.A.* 48:2-21.2. . . . it is entirely reasonable to assume that the Legislature must have had the earlier general act in mind when it adopted the later, more specific statute, and intended that the limitations in the former act should not apply to the latter. *Kingsley v. Wes Outdoor Advertising Co.*, 55 *N.J.* 336, 339 (1970). In the normal course of events, the PUC may rely on the interactions of the market place to give rise to reasonable rates. Where this competitive protection fails, the PUC in its discretion may require the contractor to demonstrate the reasonableness of its rates. *See, In the Matter of F.M. Leise, t/a Hudson Haulage Co., supra; In the Matter of Joseph P. Clancy, supra. Saddle River* at 25-26 (footnote omitted).

The Board is not required to utilize a rate base approach to review rates established by contract. The Act, as recognized by our Supreme Court in *Saddle River*, grants the Board a large amount of discretion in regulating the rates of solid waste entities. I am persuaded that even if a determination were made that the contracts in question were not the result of arms-length negotiations in a competitive market, a rate base approach to review the initial tariffs filed by Essex, the reasonableness of which is the ultimate determination to be made in this proceeding, is not required. Although the fact that the contracts must, of necessity, be reviewed for general reasonableness pursuant to the Board's holdings in this proceeding, it cannot be sufficiently stressed that the tariffs, even in the absence of underlying contracts, could be reviewed by the Board pursuant to standards other than a rate base one. As referenced hereinabove, an initial tariff filing is one of the statutory exceptions to the requirement that a rate base generally must be established in reviewing rates and charges for reasonableness. More specifically, the Board is not required to find a rate base where "the product or service is a new offering and not covered by an existing rate, fare or charge approved by the board." *N.J.S.A.* 48:2-21.2(c). The Court alluded to this situation in its distinction between tariffs and contracts in *Saddle River*, noting that a tariff's ". . . application may or may not have been preceded by a rate-making hearing." *Saddle River* at 29.

The distinction between tariff filings involving initial tariffs and those proposing increases in charges is also reflected in Board regulations, *Compare N.J.A.C.* 14:1-6.15 with *N.J.A.C* 14:1-6.16. Board regulations also recognize that utilities may enter into contracts with customers providing for service at rates different from those reflected in existing tariffs, *N.J.A.C* 14:3-9-6. The applicable regulation provides for Board review prior to the effective date of such contracts and for the filing of underlying cost data. It does not require the filing of Income Statements and Balance Sheets, as is the case with petitions for rate increases. It is clear that the Board has recognized that it is not required to use a rate base/rate of return approach when reviewing contracts and initial tariffs.

Regulations specifically applicable to solid waste utilities reinforces the distinction between initial tariff filings and those proposing increases in rates, *N.J.A.C* 14:3-10.9(c) & (d). The Board's regulations parallel the general rate provisions of the Act, which provide that the Board may, upon complaint or its own initiative, after hearing, direct any solid waste utility to furnish proof that its rates for service do not exceed just and reasonable rates for such services and that the Board, upon a determination that they do, may make an adjustment in rates, contracts or agreements to a sum which shall result in just and reasonable rates, *N.J.A.C* 14:3-10.9(a) & (b).

The Board has clearly recognized a distinction between the solid waste industry and more traditional utilities. In fact, a fair reading of the Board's orders in this case indicates that the Board did not anticipate nor desire a determination of whether or not the County could have obtained contracts more favorable than the ones in question, but limited consideration to the reasonableness *per se* of the contracts. In ruling upon a discovery motion, the Board stated in its February 10, 1989 Decision and Order Upon Interlocutory Review:

> We agree with the ALJ that the discovery should be provided. However, we also agree with Essex that the issue before the OAL is the reasonableness of Essex's interim, initial rates (which issue, of necessity, includes the reasonableness of its contracts with the transfer stations) *and that the Board did not intend that Essex's planning decision in respect to the transfer stations*, which it was by law required to make and which was approved by the Department of Environmental Protection, *be relitigated at the OAL. It may be, especially in retrospect, that Essex might have been able to obtain contracts from other contractors more favorable than the ones in question. However, be that as it may, the question for decision is whether the contracts entered into were, under all the circumstances, reasonable at the time.*" (February 10,

> 1989, Decision and Order Upon Interlocutory Review, p.6 (emphasis added).

The Board also noted in this respect, referencing its Order of July 31, 1987, that "(H)ad the Order and the related July 28, 1987 hearing not been required on an emergent basis, they would, in all likelihood have been preceded by an in-debth (sic) look at the solicitations and procedures which culminated in the transfer station contracts. . . *Id.*

The Board has recognized, not only in this proceeding but in others, that a rate base/rate of return approach is not mandated in the review of the reasonableness of rates reflecting contracts. In its review of contracts entered between the PCUA and Pen Pac providing for the operation of transfer stations, and between the PCUA and Chambers Development regarding license rights in Chambers Development landfills, the Board noted:

> The legal criteria that must be met in the Board's consideration of the approval of these contracts are set forth in *In re Application of Saddle River*, 71 *N.J.* 14 (1976). The gravamen of the holding of that case is that if the Board is satisfied that the contract rate has been determined through the competitive interactions of the market place, that the Board may accept and approve the contract in lieu of tariff. In accepting the contract as the tariff rate, the Board is not bound to determine rate base and rate of return. (Ex. WMNJ-55, p. 2).

The information required by the Board in reviewing the above referenced contracts is on its face much less detailed than has been provided both in discovery and as evidence in this proceeding. The Board ultimately found in the PCUA matter that:

> The petitioning Authority has demonstrated to the Board's satisfaction through competent evidence that Pen Pac and Chambers contracts were arrived at through competitive negotiations in the open market

place, and the Board will therefore *ACCEPT AND APPROVE* the contracts to govern rates as the lawful tariff rate (Ex. WMNJ-55, p. 3).

The expert testimony offered by Bicksler for Solid Waste Transfer and by Mullee and Guastello on behalf of WMNJ regarding the inappropriateness of a rate base methodology to this proceeding was persuasive. As the witnesses, including Cotton, generally recognized, methodologies such as the rate base approach are used to simulate the economic outcomes of a competitive market. There is no compelling reason to create a surrogate for competitive outcome where the contracts in question were the result of arms-length negotiation in such market.

I am also persuaded by the testimony that rate base regulations is not appropriate for transfer station operations, which are labor intensive, as opposed to capital intensive. The contracts, as discussed hereinabove, are fixed-cost contracts without the option of cost increase pass-throughs available to more traditional utilities, which also have monopoly status with low capital turnover ratios.

As brought out through witnesses offered on behalf of Solid Waste Transfer, rate base regulation is not particularly appropriate to an entity which is labor intensive. The Transfer Station operations are dissimilar from traditional, capital intensive utilities, having monopoly status and low capital turnover ratios, which provide a stable source of revenue and allow economic integrity to be protected by rate regulation suitable to high capital investment in fixed plant. As Bicksler noted, a fixed-cost contract does not allow for cost pass-throughs associated with rate base regulated utilities. The fact that the regulation of the solid waste industry pursuant to the Act represents a departure ". . . from the traditional concept of a public utility, which might, perhaps, be characterized as an enterprise enjoying monopoly power by virtue of a governmentally granted franchise" . . . has been recognized by our State Supreme Court, as has been ". . . the need for differing regulatory techniques appropriate to the variety of enterprises

now emerging as public utilities." The need for such flexibility reflects the facts that the ". . . structure of the solid waste collection industry is not monolithic, like that of the more conventional utilities-- railroads, electric, gas and telephone companies." *Saddle River*, at 22. In addition, as brought out through Bicksler's testimony, known and measurable cost increases and pro forma statements are not applicable to Solid Waste Transfer and WMNJ as of June 1987, nor more currently.

Cotton, who testified on behalf of Rate Counsel, did not address in his prefiled testimony the question of whether the transfer stations are capital intensive utilities. However, he asserted on cross-examination that a rate base method takes into consideration the capital intensive nature of the utilities and that it was his opinion that both Solid Waste Transfer and WMNJ are capital intensive. His definition of whether a particular company is capital intensive, however, was somewhat vague:

> "Well, I think you have to have a concept of the assets employed, and quite frankly, I think another way of making a quick determination is go down and visit a transfer station, the buildings at a transfer station are very large and, as it turned out, they cost quite a bit of money, and the equipment that is used at a transfer station is also very impressive, and it also costs quite a bit of money.
>
> I have been to several transfer stations, and it is obvious that it is a capital intensive business. I also reviewed the balance sheets of several transfer stations, at least four or five of them, and they are very capital intensive, there is no doubt about it." (Tr., Vol. 24., pp. 101-102).

This is not the type of fact-sensitive analysis which is persuasive.

Reliance upon contract prices is particularly fair and reasonable in this proceeding, given the allocation of risks

between the Transfer Stations and the County, as evidenced by prior Board decisions on test year adjustments (*See, Appendix C to WMNJs initial brief*). the Board generally sets tariff rates on a cost-plus basis for traditional utilities, with an opportunity for post-test-year adjustments for known and measurable changes. The traditional approach also assumes that a utility may file for a rate increase if it deems its rate to be inadequate to meet current or future costs, *See, N.J.S.A.* 48:2-21(d). The contract price in these proceedings, inclusive of annual CPI increases, were fixed charges. WMNJ, for example, absorbed higher operational expenses than those anticipated, including transportation and disposal costs. The Board has generally recognized that conduct is to measured not by hindsight, but its reasonableness and prudency under the attendant circumstances at the time in question. *See, e.g., In the Matter of South Jersey Gas Company*, OAL Dkt. No. PUC 6453-85, BPU Dkt. No. GR 8508858, Decision and Order dated March 23, 1987 (Appendix D to WMNJ's initial brief). In addition, as noted, the Board and Rate Counsel both had an opportunity to review the contracts in the context of the DEP's emergency procedures.

Rate Counsel's witnesses testified that a rate base/rate of return approach applicable in this proceeding would require an analysis of expenses and profit of all entities which contract with WMNJ and Solid Waste Transfer, and of all entities which, in turn, contract with those companies, etc. It is apparent that such an approach borders on administrative infeasibility. It would require, for example, a rate base/rate of return analysis not only of WMNJ and Solid Waste Transfer, but of MIS, EWP, etc. The availability of the required information from non-related entities is questionable.

When a rate base finding is not required, comparison with market prices for similar services and use of operating ratios are sustainable regulatory methodologies for the determination of reasonableness of rates. *See, In re Suburban Transit Corp. Rate Increase*, 184 *N.J. Super.* 90 (App. Div. 1987). In fact, the principle that it is the end result, not the particular analytical approach used, which is important in determining

the reasonableness of rates is a well-settled one, *Federal Power Com. v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).

As brought out in Guastello's, Mullee's and Bicksler's testimony, an operating margin approach is more reasonable to determining rates than a rate base/rate of return methodology for the Transfer Stations in light of the fact they are expense intensive businesses, that is, their operating expenses substantially exceed capital costs. The crux of the analysis in this respect, which analysis I find persuasive, was that the income stream provided by a return on undepreciated property costs could not withstand minor fluctuations in overall expenses. Intervenors and Rate Counsel's testimony and positions on this issue were, as indicated, theoretical in nature. No witness on behalf of the other parties addressed the issues of risk assumed by the transfer stations in providing emergency and expense-intensive services under multi-year fixed year contracts and compensation therefore. The only other witness on risk, as indicated, had not even read the contracts because, as noted, Rate Counsel had indicated that they were not relevant.

The Staff, as indicated, presented no witnesses and based its briefs upon an assumption that a rate base/rate of return approach must apply. The testimony of Rate Counsel's witnesses was similarly based upon presumptions that a traditional rate base/rate of return approach must apply in this proceeding. Rate Counsel did not elicit testimony that such an analysis is specifically appropriate to the facts of this case or generally appropriate pursuant to the Solid Waste Utility Control Act.

The considerations underlying Rate Counsel's analysis are also questionable. Cotton, for example, testified that a rate base consisting of transfer station utility plant owned by WMNJ and Solid Waste Transfer and other affiliates should be developed. Cotton concluded that it was appropriate to consolidate the Glopak land, EWP's equipment used relating to its contractual responsibilities to Solid Waste Transfer, and the cash working capital needs generated by Glopok and EWP into Solid Waste Transfer's rate base. Underlying his

approach was the conclusion that Solid Waste Transfer, EWP, and Glopak, are affiliated interest companies. Although the relationships among these companies may be carefully considered, they are not, strictly speaking, affiliated companies. As found hereinabove, the contracts between Solid Waste Transfer and WMNJ and Essex are reasonable. Martin, Sr.'s interest in Solid Waste Transfer was acquired after negotiation of the Glopak lease. As found, there has never been any family relationships between Glopak and Solid Waste Transfer shareholders. Martin, Sr. and M. Mauriello had no contact prior to negotiation of the lease. Cotton did not address evidence in the record regarding the Solid Waste Transfer and Glopak negotiations, which resulted in the land lease, nor the fact that such negotiations appear to be at arms-length. Although a hindsight approach should not be used, the record also establishes the extent of litigation which has been incurred in connection with the business relations among Glopak, Solid Waste Transfer, EWP, and persons associated with these entities, further detracting from Cotton's conclusions. Martin Sr., as found hereinabove, had no relationship with Solid Waste Transfer nor its principles at the time of Solid Waste Transfer's response to the Solicitation of Interest. In addition, as found, Solid Waste Transfer's initial proposal to Essex identified three potential sites for operations, none of which were owned by Glopak or connected to Martin Sr. The credibility of Rate Counsel's position is further undermined by Cotton's testimony on cross-examination that he had not concluded in his analysis that any alleged particular affiliated transaction regarding the transfer stations was financially unreasonable and that he had no reason to believe that any of the alleged affiliated transactions which the transfer stations may have had since July 31, 1987 were unreasonable. Solid Waste Transfer's emphasis upon Cotton's testimony and cross-examination that he had not "made that thorough an examination" in that respect, is persuasive, especially in light of the fact that all transactions in question were discussed at length in the prefiled direct testimony offered on behalf of WMNJ and Solid Waste Transfer (Tr., Vol. 24, p. 106).

Rate Counsel's specific proposed adjustments, even if a rate base/rate of return approach were adopted, are not compelling in light of a lack of foundation evidenced in the testimony of its witnesses. Cotton testified on cross-examination, for example, that he did not know if Solid Waste Transfer had a contract with EWP for services. He also testified that he had not made a determination regarding the reasonableness of the expenses charged to Solid Waste Transfer by EWP. It is clear that Rate Counsel's witnesses did not subject Solid Waste Transfer's agreement with EWP and Glopak to the strict analysis which it recommends should be adopted in this proceeding.

Cotton testified that he was not able to complete a rate base/rate of return analysis in this proceeding, nor to conclude whether the Transfer Stations generated an appropriate level of revenues to recover their costs on a fair return. The testimony of the witnesses offered on behalf of Solid Waste Transfer and WMNJ in this respect, was, in contrast, specifically based upon a review of the Balance Sheets of the Transfer Stations. The insufficiency of the basis for Rate Counsel's theoretical position is further highlighted by Cotton's testimony that he did not review the contracts in question for their overall reasonableness, although he acknowledged that utility regulation exists to achieve the end results of competition. I am not persuaded by his testimony that a contract price can be removed from a contract and reviewed in isolation from all other terms. As Bicksler testified, a contract negotiation will result in a risk-sharing allocation between parties directly impacting on the cost of services provided.

The theoretical nature of Rate Counsel's position is reflected in Cotton's failure to ultimately develop a recommended rate base. The extensive procedural history referenced hereinabove is relevant in this respect. All parties had notice prior to the start of hearings that positions could proceed based upon differing argued methodologies and that petitioners and respondent would not be required to present a rate base/rate of return approach, albeit at their risk. Discovery in this proceeding was extremely extensive. However,

Rate Counsel's discovery requests propounded to Solid Waste Transfer which would have provided information which Cotton testified was necessary for development of his recommended rate base were quashed because they were filed untimely. This information was specified to be an EWP Balance Sheet, or its equivalent, and information with respect to the maintenance and taxes associated with the Glopak land lease. In fact, at least as of March 23, 1990, the date of Cotton's cross-examination, Rate Counsel acknowledged that there was only one outstanding data request, which request sought information regarding the utility plant of EWP which is also used in transfer station operations, information which, as Solid Waste Transfer argues, may not have been available from the parties to this proceeding. In any event, Cotton testified on cross-examination that he could not calculate a recommended rate base, even with the referenced information from EWP, without information such as the EWP Balance Sheet or its equivalent and information concerning taxes and maintenance of the Glopak property, information which, as noted, was untimely requested by Rate Counsel in interrogatories which were subsequently quashed.

I am also not persuaded by Rothdhild's testimony. For example, he based his opinion that Solid Waste Transfer possessed a capital structure consisting entirely of debt on petitioner's December 31, 1988 Balance Sheet, not accounting for the initial $100,000 investment by shareholders. Rothchild's summary of Solid Waste Transfer's agreement with investors was also not entirely accurate. Rothchild, in addition, did not even consider the fact that the County tariff rates subject to review in this proceeding reflect contracts, not even having read the contracts at issue prior to the preparation of his testimony. It is apparent from that testimony that Rothchild assumed that the Transfer Stations were similar to traditional-public utilities, with an ongoing life and regulated on a cost basis. He testified that he did not read the contracts in question because he was requested to determine the cost of equity based on assumptions that the Transfer Stations were regulated public utilities and that it was not relevant to read the contracts because he was advised by counsel that the

contracts were not binding. This failure to at least consider the terms of the contracts in question is significant, as Solid Waste Transfer argues, in light of Rothchild's testimony that there is no reason why the Board could not review a contract for reasonableness in terms of its various provisions. Without belaboring the point, it is also apparent that Rothchild did not have a clear understanding of any distinctions between contracts and tariff rates. Broad discovery was allowed, pertaining to various theories advanced, including a rate base, rate of return approach. Hundreds of interrogatories, including subcomponents, were propounded and served upon WMNJ and petitioner and responded to unless quashed. A total of nine depositions were taken, including the depositions of three representatives of WMNJ requested by Newark.

The Staff recommends use of the average actual transportation and disposal costs for WMNJ for the first contract period, August 1, 1987 to July 31, 1988. The Staff does not find Stevens' testimony regarding transportation and disposal costs persuasive, noting that if WMNJ were to dispose of waste in western Pennsylvania, additional transfer trailers would have to be purchased and increased transportation charges would be incurred, as well as increased costs for drivers and other operating expenses. As the Staff notes, Stevens did not consider clauses in the contract, between WMNJ and its transporter providing that each tractor is to take ten pay loads per week from the WMNJ Transfer Station to landfills in Pennsylvania. Without reference to any support for its discussion of an analogy to water utility costs, and the treatment thereof, the Staff accepts costs of landfill disposal and transportation for the first contract period, but recommends that no increase over the first contract year be reflected in rates, an inconsistent position. The Staff concludes that $30 per ton is a reasonable expense for landfill expenses paid to Chambers Development. As the Staff notes, Stevens' rate of $35 per ton for disposal of Type 10 waste does not include costs for maintenance and tire expense. Similarly, regarding operation and maintenance expenses, the Staff recommends allowing those expenses incurred by WMNJ for the first year of the contract, but no increases in such expenses during subsequent

years. It calculates a $2.55 per ton County administrative charge, which amount it finds to be reasonable in lieu of Essex $2.85 per ton charge.

The Staff acknowledges that $14.78 per ton to EWP for its service fees was reasonable at the time the contracts were initially negotiated and recommends uses of the expected reduced rate of $11.16 per ton. Although not taking a position as to whether Lasser's or Marashlian's appraisals of the Glopak lease was more reasonable, the Staff, concluding that the lease was not negotiated at arms-length, uses the fair net rental in the amount of $129,000 per year developed by Lasser. Officers' salaries are accepted as reasonable.

The Staff concurs with Solid Waste Transfer's depreciation expense and officers' salaries but makes other adjustments in operating expenses with which it does not concur. Based upon Solid Waste Transfer's 1987 and 1988 Annual Reports, the Staff accepts the amounts indicated therein for legal expense for Solid Waste Transfer and, noting that Solid Waste Transfer did not compute a legal expense for 1990, calculates a legal expense for January 1989 to July 1990 in the amount of $152,257, but does not explain how that amount was derived, although it notes that it includes rate case expenses.

Rate Counsel argues that Solid Waste Transfer's depreciation should be spread over the ten year life of the contract, that Solid Waste Transfer should itemize its accounting and legal fees so that rate case expenses can be apportioned and that start-up legal and accounting costs should be capitalized. Rate Counsel also notes that Essex should provide an itemization of its costs associated with the Transfer Station and that Essex should not be allowed to collect any revenues for a ten percent reserve contingency, as requested by the County. Rate Counsel proposes a 12.5 percent return on equity for WMNJ and an overall rate of return of 9.66 percent.

Rate Counsel's return recommendation is based on Rothchild's analysis, which utilizes what is referred to as the Merrill Lynch variation of a Discounted Cash Flow analysis. It is based upon using WMNJ's argued capital structure, 7.12

percent for common equity and 92.8 percent advances from affiliates, which is treated as debt. Rate Counsel, proposes a capital structure consisting entirely of debt for Solid Waste Transfer, using Solid Waste Transfer's cost of 14.5 percent.

The Staff and Newark argue that WMNJ's management fees should not be reflected rates because of a failure by WMNJ to seek Board approval of such contract pursuant to *N.J.S.A.* 48:3-7.1., in light of my determination that a rate base/rate of return approach should not be used, I make no findings nor conclusions regarding WMNJ's obligations pursuant to the referenced statute.

Lasser's analysis, as one example of a component of a rate base/rate of return approach, is not a persuasive argument for adoption of a traditional methodology. Lasser, in essence, as Solid Waste Transfer argues, viewed the Glopak site as another parcel of property in Newark's I-3 zone, not demonstrating cognizance that it met stringent State and County siting criteria for the operation of a transfer station. His approach assumed constant availability of similar properties for purchase, a premise not supported in the record. The proposition that an annual rent of $129,000 would have been deemed reasonable by a lessor with knowledge that the proposed facility was expected to handle in excess of 2,000 tons of waste per day, at a rate of approximately $90 to $100 per ton, strains credibility. In addition, Marashlian's comparative sales were closer to the August 1, 1987 lease date than the data relied upon by Lasser. Lasser's fair market estimate also did not reflect any opportunity costs for Glopak and its unavailability for future use of nearly all the buildings on the site that were rentable. In addition, the assertion that there was no ECRA risks was contradicted by Martin Sr.'s testimony that hazardous waste, although not allowable, has been brought to Solid Waste Transfer's facility, and must be separated from acceptable waste. The record also demonstrates that DEP investigators are on site to monitor the handling of hazardous waste. Solid Waste Transfer's argument that the ECRA risk was most acute during the early stage of the project because the DEP allowed operations without pushwalls or a tipping floor

is persuasive. I am not persuaded by Newark's reliance upon the fact that Marashlian utilized one sale made under duress. As Marashlian testified, reliance on a distress sale is acceptable if an adjustment is made for such factor. His approach in this respect was reasonable. In addition, Solid Waste Transfer's argument that allowance of an annual rental expense for the Orange site, which the 1988 Annual Report identified as $101,250, should be allowed, is persuasive in light of the fact that Solid Waste Transfer was required to maintain the availability of this site.

As the evidence demonstrates, WMNJ's depreciation expense, which was based upon depreciation of capital costs for construction improvements over the 30-month term of the contract, is reasonable on its face. At the time the contract was executed and the contract price was fixed, even assuming a rate base approach, the known and measurable economic life of the facility was the 30-month term of the contract. As found, Essex expected to have the research recovery facility operational in January 1990, at which time all Type 10 solid waste received at the Avenue A facility would be directed to the resource recovery facility. WMNJ produced an asset-by-asset breakdown of properties, their costs and lives, and depreciation expenses. The basis for the Staff's conclusion that respondent has not met its burden of proof regarding depreciation expense is unclear. In addition, the Staff's reference to "net utility property" of Waste Management of Pennsylvania, Inc., is ambiguous. The Staff's conclusion, based upon its review of the record that transferred property was never used and useful during the first contract year is suspect.

The Staff analysis of the CPI escalator provisions is based upon the assumption of a rate base/rate of return approach to determine the appropriateness of increases in tariff rates, not an initial tariff, contract situation. The CPI-based escalator clauses in the contract in question are narrowly constructed, resulting in increases to be recovered only to the extent that the relevant CPI increases. As the record evidences, it is not uncommon for contracts generally to incorporate mandatory

minimum costs-of-living increases and allow for pass-throughs of change-of-law costs.

Newark's and the Staff's positions regarding refunds pertaining to Solid Waste Transfer, especially regarding rebating the difference in the processing fee to EWP, was not related to any analysis of what a reasonable return for Solid Waste Transfer would be. The Board recently approved, on an interim basis, rate increases for Ellesor to allow recovery of Pennsylvania landfill surcharges of $3.25 per ton, *In the Matter of the Petition of Ellesor, Inc.*, BPU Dkt. Nos. SR88121309 and SR88121310, Interim Relief Subject to Refund dated February 8, 1989. The Board also approved put-or-pay provisions in Pen Pac's contract for transfer station services. The Staff does not supply record support for its conclusion that recovery of $709,471 expensed to a Management Fee Account and $709,482 expensed to the Corporate Service Account would be a double recovery. The Staff relies on Solid Waste Transfer's Annual Reports, but does not include reference to all expenses contained therein. In addition, if a rate base/rate of return approach is used, implicit, reliance upon a test year prior to 1990 is suspect. The Staff's position regarding WMNJ ignores the put-or-pay provisions of the contract.

A determination of reasonableness of rates based upon a rate base/rate of return approach must incorporate an examination of the facility's rate base, its income and expenses, and a rate of return developed by relating income to rate base. Rate of return must be sufficient to permit the utility to maintain its financial integrity, attract capital, and provide a return to the equity owners commensurate with returns on investment and other enterprises having corresponding risks. *New Jersey Bell Telephone Company v. State*, 162 *N.J. Super.* 60 (1978). The Staff's position also does not provide for a return of capital, as well as a return on capital. Finally, I am persuaded by WMNJ's argument regarding Rate Counsel's position that the cost of start-up advances is a debt cost.

At the time of hearings, projected administrative costs for the County were $1,844,000, which estimate was reasonable. The Staff's analysis in support of its calculation of a $2.57 per ton administrative cost surcharge was based upon Essex' actual administrative costs for 1989 and did not incorporate consideration of the administrative cost increases projected for 1990. The projected administrative cost increases included costs for two additional County police patrol vehicles and personnel to man them, as well as projected and contracted salary increases. Assuming total 1990 Transfer Station tonnage of 700,000 tons and no application of administrative cost reserves as a credit and offset against these charges, funding of the 1990 administrative costs projection would require a per ton surcharge of $2.63. The Staff incorporates in its analysis an allowance for Board assessment fees of $118,342, an item not addressed in the record. As Essex argues, reflection of such an assessment, in addition to the projected cost increases, would result in a per ton administrative charge of $2.80.

Essex provided in discovery numerous pages of itemized, detailed documentation for its 1987 and 1988 administrative charges. In addition, I am persuaded by the County's arguments in opposition to Rate Counsel's recommendation that Essex' inclusion in rates of a ten percent reserve contingency is unwarranted. Newark does not dispute the reasonableness of the County's prior administrative charges, but proposes that Essex' surcharge, prospectively, should be $2.09. However, as Essex argues, intervenor apparently bases its position on the fact that 1989 administrative charges were anticipated to be less than those for 1987-1988.

The briefs of Rate Counsel, the Staff, and intervenor are replete with assertions of difficulties encountered in developing positions because of voids in the record. As noted hereinabove, the discovery process in this proceeding was extensive. I, as noted, issued an order concluding that petitioners and respondent were not required to present evidence based on any specific methodology. The parties had ample opportunity and notice to develop a record to support a rate

base/rate of return or any other methodology. Discovery, although subject to numerous motions, was extensive and included the opportunity for depositions. As discussed, data which Rate Counsel now claims is essential for it to develop its position was the subject of untimely interrogatories served by Rate Counsel, which interrogatories were ultimately quashed because of a failure to comply with deadlines established for the completion of discovery. Newark's assertions that there is no evidence whatsoever indicating that the contract prices were negotiated at all, let alone on an arms-length competitive basis, is belied by the extensive evidence in this proceeding. Wiley, Karpinsky and M. Mauriello had detailed knowledge of various aspects of the process, commencing with consideration of the transfer station program initially by the DEP through issuance of the County's Solicitation of Interest and the ultimate award of contracts. Each of these witnesses was extremely credible and forthright, not hesitating on cross-examination to testify to information which was not always favorable to their positions. Annual Reports filed by Solid Waste Transfer, as well as financial data in the record, were available to all parties. Solid Waste Transfer presented J. Mauriello, its accountant, for cross-examination regarding the reasonableness of expenses. In addition, Bicksler testified regarding his analysis of an appropriate rate of return under varying regulatory methodologies. J. Mauriello's background in finance and economics is extensive, and he was an extremely credible and persuasive witness. Motions by Newark to depose WMNJ's vice-president, Joseph Graziano, on contract negotiation matters, to depose the Avenue A Transfer Station Comptroller regarding the facility's internal financial conditions, and to depose its president regarding WMNJ's transactions and agreements with affiliates were granted. I am persuaded that no further proceedings regarding this matter should be conducted, that the interim tariffs are reasonable and should be approved as permanent rates, and that the contracts in question are reasonable and should be approved.

Based upon a review of the entire record, I **FIND** the following to be additional **FACTS**:

255. A rate base/rate of return approach is not appropriate for determining the reasonableness of the tariff rates and underlying contracts in question in this proceeding. A more appropriate approach is an arms-length competitive market one. Such an approach, corroborated by comparative rates and operating ratio analyses, demonstrates the reasonableness of the tariff rates and the contracts in question.

256. The interim tariff rates approved by the Board for Solid Waste Transfer are reasonable.

257. The interim tariff rates approved by the Board for WMNJ are reasonable.

CONCLUSIONS AND ORDERS

Based upon the above findings, I **CONCLUDE** that Essex' interim initial tariff rates for the Avenue A and Avenue F Transfer Stations should be approved on a permanent basis, that the underlying contracts between Essex and Solid Waste Transfer and the County and WMNJ should be approved, and that refunds should not be ordered. I also **CONCLUDE** that the component of the tariff rates in question reflecting the County's administrative charges are reasonable and that no adjustments should be made in such component charges. In light of the above findings and conclusions, it is not necessary to reach Solid Waste Transfer's and WMNJ's arguments that an order requiring rebates of service fees received would be impermissible retroactive ratemaking and that forfeiture of CPI increases would be invalid regulation. I am also not persuaded that determination of WMNJ's claim that the funds accrued by the County under its interim tariff rates should be used toward the payment of contract claims is before me. Finally, I hereby **CONCLUDE** and **ORDER** that Count III of Essex's supplemental petition of February 4, 1988, requesting approval of a compaction ratio of 3.1 cubic yards, be **DISMSSED**. Essex's initial traffic rates are **APPROVED** as permanent rates, and the underlying contracts are **APPROVED**.

I hereby **FILE** my initial decision with the **BOARD OF PUBLIC UTILITIES** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF PUBLIC UTILITIES**, which by law is authorized to make a final decision in this matter. If the Board of Public Utilities does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE BOARD OF PUBLIC UTILITIES, TWO GATEWAY CENTER, NEWARK, NEW JERSEY 07102**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 26, 1990 /s/ Diana C. Sukovich
Date DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

December 27, 1990 /s/ John T. Sisler
Date BOARD OF PUBLIC UTILITIES

Mailed To Parties:

Dec 31 1990 /s/ Jaynee La Vecchia
Date OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Essex County:
Martin M. Lund
Joseph Galluzzi

For Solid Waste Transfer and Recycling, Inc.:
Mark Mauriello
Harold Martin, Sr.
Anthony Ross
Robert E. Karpinsky
James L. Bicksler
Joseph B. Wiley III
Peter Cerenzio
Peter Sepelya
Joseph Mauriello
Richard Marashlian

For Waste Management of New Jersey, Inc.:
Henry G. Mullee
John Guastella
E.S. Savas

For City of Newark:
John O. Lasser
Garrett Smith
Barbara J. Stevens

For Division of Rate Counsel:
James A. Rothschild
James D. Cotton

LIST OF EXHIBITS IN EVIDENCE-ESSEX

P-1 Essex County Ordinance)?-87-0009 dated June 3, 1987 amending Solid Waste Management Plan

P-2 DEP Certification of approval dated June 8, 1987

P-3 Contract between County of Essex and Waste Management dated July 1, 1987

P-4 County Resolution dated July 1, 1987

P-5 Contract between Essex County and Solid Waste Transfer dated July 1, 1987

P-6 County Resolution approving contracts dated July 1, 1987

P-7 Ordinance No. 0-88-0016 dated April 27, 1988

P-8 Prefiled testimony of Martin M. Lund, Jr.

P-9 Document BPU Public Information Office dated 6/27/89

P-11 Amended pre-filed testimony of Joseph P. Galluzzi with schedules

N-36A Pages 1 and 10 and pages 33 through 43 of Marashlian Appraisal as of May 11, 1989

N-37 Description of Waste Management, Inc. Cash Management System

P-SWTR-1 Prefiled testimony of Mark Mauriello

- P-1 Essex County Solicitation of Interest
- P-2 Glopak Lease
- P-3 SWTR response to Co. S of I
- P-4 SWTR/Essex Contract
- P-5 SWTR/Chambers Agreement, 1987
- P-6 SWTR/Multistate I.s. Contract
- P-7 SWTR/Advanced Transp. Serv. Contract
- P-8 Gov. Kean Cert. of Imminent Peril, June 23, 1987; DEP Statement of Imminent Peril, June 18, 1987
- P-9 Co. Resolution, May 13, 1987; DEP Cert. of Plan Amendment

P-10 SWTR Master Performance Permit, June 30, 1987

P-11 SWTR/442 Waste Management Agreement, July 23, 1987

P-12 SWTR/ Chambers Contract Addendum

P-13 SWTR/Chambers Agreement, 1988

P-14 SWTR Agreement re: So. Orange site

P-SWTR-2 Prefiled Testimony of Harold Martin, Sr.

P-SWTR-3 Letter dated May 5, 1987 to Giblin from J.B. Wiley, with 5-page attached report re site evaluations

P-SWTR-4 Letter dated April 1, 1987 to Garrett Smith from Cosulich, with attachment re site evaluations

P-SWTR-5 Letter dated April 24, 1987 to Garrett Smith from McDowell, with attachments re site evaluations

P-SWTR-6 Evaluation of Proposals for Interim Period Disposal

P-SWTR-7 Evaluation of Proposals for Interim Period Disposal

P-SWTR-8 Prefiled testimony of James L. Bicksler

P-SWTR-9 Errata, prefiled testimony of James L. Bicksler

P-SWTR-10 Prefiled testimony of Joseph Mauriello

P-15 ..... SWTR Annual Rpt, 1987

P-16 ..... SWTR Annual Rpt, 1988

P-17 ..... Statement of Cash Flows 8/1/87-12/31/88

P-18 ..... Appraisal, as of August 1, 1987

P-SWTR-11 Appraisal of 442-470 Frelinghuysen Avenue, Block 3516, Lot 24 (part) in Newark, New Jersey prepared by Richard Marashlian on behalf of Solid Waste Transfer & Recycling, as of August 1, 1987

JB-1 Subpoena Duces Tecum of James Barry

JB-2 Affidavit of James P. Barry in Support of Motion to Quash Subpoena

RC-1 SWTR Response to RCR-SW-39 re Chambers deposits

P-12 A computation of tonnages at two transfer stations

N-3 Report on County Police Expenditures for the month of March 1989

N-8 Page 73 of deposition of Mark Mauriello taken on 11/20/89

N-9 Responses of SWTR to City of Newark interrogatory No. 9 re: employees and officers of SWTR

N-10 SWTR Certificate of incorporation

N-12 SWTR response to Newark interrogatory No. 26 re minutes and reports of meetings

N-14 A Certification of Mark Mauriello dated June 13, 1988

N-15 SWTR response to SR-15 re stockholders

N-19 Co. Div. of Solid Waste Mgt. Memo dated May 11, 1987

N-20 Value Line for Waste Mgmt, Inc. June 30, 1989

N-21 Value Line for Laidlaw Trans 'B' June 30, 1989

N-22 Value Line for Safety-Kleen June 30, 1989

N-23 Value Line for Rollins Env. Serv. June 30, 1989

N-24 Value Line for Browning-Ferris June 30, 1989

N-25 Pre-filed testimony of John O. Lasser

N-25A Lasser Appraisal report

N-26 Amended Consent Judgment Law Division Essex County Docket L-21706-81 dated March 2, 1982

N-28 Stevens, amended pre-filed testimony

Exhibit A ..... Resume

Exhibit B..... WMNJ/Essex Co. Contract

Exhibit C ..... SWTR/Essex Co. Contract

Exhibit D..... WMNJ/Ecowaste Contract

Exhibit E..... SWTR/Multistate I.S. Contract

Exhibit F..... SWTR/Advanced Trans. Serv. Contract

Exhibit G..... SWTR/Chambers Agreement

Exhibit H..... Addendum jSWTR/Chambers Agreement

Exhibit I..... Prefiled Testimony, Galluzzi

Exhibit J ..... WMNJ month-by-month disposal costs

Exhibit K..... WMNJ response to Co. S of I

Exhibit L..... SWTR flow rrpt to DEP, January 1988

Exhibit M..... WMNJ flow rpts to DEP, January, March, April 1988

Exhibit N..... Seattle RFP

Exhibit O ..... Responses to Essex S of I

Exhibit P..... Deleted

Exhibit Q ..... Percentages Operating Margins

Exhibit R ..... WMNJ first response to SR-23 re: dumping costs

Exhibit S..... WMNJ first response to N-SR-1 re: landfill charges

Exhibit T ..... Transportation costs

Exhibit U..... Excerpts from PA DER Report

Exhibit V ..... Stricken

Exhibit W ..... Conclusions

N-29 Disposal Agreement, Phil. and WMPA dated June 30, 1988

N-31 Essex County Solid Waste Tipping Fee Summary of Tons Delivered August, 1987 to December 1989

N-32 NJDEP Request for Proposals

N-34 WMNJ responses to SR-8 and N-SR-8 re: WMPA officers as of 9/11/89

RC-3 SWTR Depreciation Schedule

RC-4 SWTR Response to RCR-SW-47 re legal fees

RC-5 Prefiled testimony of James A. Rothschild

RC-5A Two sheets correcting Schedule five and Schedule One, Page One of Mr. Rothschild's prefiled testimony

RC-6 Prefiled testimony of James D. Cotton

RC-7 Dow 30 Average Return

RC-8 Amended and Revised Schedule 4 of Rothschild's prefiled testimony

WMNJ-1 Prefiled testimony of Henry G. Mulle

WMNJ-2 Solicitation of interest issued by the County dated 12/10/86

WMNJ-3 Master Performance Permit issued by DEP to WMNJ dated 7/7/87

WMNJ-4	Notice of CPI Increase from WMNJ to County of Essex dated 9/15/88
WMNJ-5	Notice of CPI Increase from WMNJ to County of Essex dated 12/22/88
WMNJ-6	WMNJ response (in part) to SR-2, transportation agreement between WMNJ & Ecowaste Transport, Inc. (Confidential)
WMNJ-7	WMNJ response to SR-8 re WMNJ officers, affiliate services and WMNJ Articles of Incorporation
WMNJ-8	WMNJ response to SR-3, pro forma balance sheet as of July 31, 1989
WMNJ-9	Morris County Transfer Station Tariff effective December 29, 1987
WMNJ-10	MCTS Settlement Agreement and attached Exhibits, dated September 16, 1989
WMNJ-10A	Final Board Orderr dated March 5, 1990 adopting in part and modifying in part Initial Decision re MCTS Settlement Agreement
WM J-10B	ALJ Initial Decision MCTS, December 12, 1989
WMNJ-11	Somerset Tariff effective December 16, 1987
WMNJ-12	Union County Utilities Authority Tariff effective February 10, 1989
WMNJ-13	Ellesor, Inc. Tariff effective February 10, 1989
WMNJ-14	Passaic County Utilities Authority Tariff effective November 1, 1989
WMNJ-15	Mercer County Improvement Authority Tariff effective May 1, 1988
WMNJ-16	Waste Management, Inc.'s 1988 report to shareholders

WMNJ-16A	Waste Management, Inc. Annual Report to Stockholders 1989
WMNJ-17	G.R.O.W.S. Disposal Agreement w/Mercer County dated February 17, 1988
WMNJ-18	Affidavit of William A. Baker indicating WMNJ-19 through WMNJ-25 are copies of contracts filed w/BPU
WMNJ-18A	Second Affidavit of William A. Baker, dated April 5, 1990
WMNJ-19	Contract between Browning Ferris Industries and West Windsor Township dated June 1, 1988
WMNJ-20	Newark resolution indicating an agreement w/J. Petrozello Company, Inc. dated February 25, 1987
WMNJ-21	Agreement between Aberdeen and Meadow-brook Carting Co., dated January 1, 1989
WMNJ-22	Contract between Borough of Runnemeade and O'Connor Corp., dated June 6, 1989
WMNJ-23	Contract between Mahwah and Crystal Carting Corp., covering period 1990-1994
WMNJ-24	Agreement between North Wildwood and Fil-more Construction Co., dated December 12, 1988
WMNJ-25	Contract between Borough of Montvale and Anchor Carting Corp., dated January 30, 1990
WMNJ-26	Prefiled testimony of John Guastella
WMNJ-27	Updated Schedule B to Guastella's prefilled
WMNJ-28	WMNJ response to SR-3, pro forma income statements and balance sheets, August 1987 to January, 1990

WMNJ-29	Update of WMNJ response to SR-3, income statements and balance sheets for the entire contract period
WMNJ-30	WMNJ responses to SR-4, month-by-month breakdown of WMNJ transportation and disposal cost for entire contract period (Confidential)
WMNJ-31	WMNJ Deed to Avenue A property
WMNJ-32	WMNJ response to SR-12, summary depreciation schedule
WMNJ-32A	WMNJ response to SR-12, full asset-by-asset breakdown of WMNJ-32 (Confidential)
WMNJ-33	WMNJ updatged response to SR-12, summary depreciation schedule
WMNJ-33A	WMNJ updated response to SR-12, full asset-by-asset breakdown of WMNJ-33 (confidential)
WMNJ-34	WMNJ response to SR-7, union labor agreement dated August 1, 1987
WMNJ-35	PA DER Report, May 1989
WMNJ-36	WMNJ responses to RCR-W-24, monthly operating reports for entire contract period--August 1, 1987 to January, 1990 (confidential regarding budget information)
WMNJ-37	Value Line for Waste Management, Inc. dated September 29, 1989
WMNJ-38	Article: "The Provision of Municipal Sanitation Services by Private Firms" dated December 1978 by Franklin Edwards and Barbara J. Stevens
WMNJ-39	Question and WMNJ responses to SR-26 to 27 retransportation costs

WMNJ-40	Update of WMNJ responses to SR-26 to 27 re transportation costs
WMNJ-41	WMNJ responses to SR-1 and N-SR-1 (3) re: landfill disposal charges
WMNJ-42	BPU Order, Crestwood Village, July 2, 1981
WMNJ-43A	General Resume of Dr. Savas
WMNJ-44	SOLID WASTE MANAGEMENT IN NEW JERSEY, November 1987 Prepared by the State of New Jersey County and Municipal Governmane Commission
WMNJ-45	Analysis of County Transfer Stations in New Jersey
WMNJ-46	Petition of Mercer County Improvement Authority for Approval of an Increase In Rates, Board Order Granting Interim Rate Increase, SR 88121279, March 1989
WMNJ-47	PA DER Report, May, 1987
WMNJ-48	Value Line, Waste Management, Inc. 7/3/87
WMNJ-49	Investments--Third Edition by William F. Sharpe, excerpt pp. 428-437
WMNJ-50	Value Line, Waste Management, Inc. March 30, 1990
WMNJ-51	Waste Management Inc. and Subsidiaries Comparative Time Horizon of Investments in Common Equities
WMNJ-52	Waste Management, Inc. and Subsidiaries Cost of (Return on) Common Equity (as of 7/1/87)
WMNJ-53	Value Line, Environmental Industry, March 30, 1990
WMNJ-54	Board Order, UCUA, Ellesor AMS, Dec. 31, 1987

WMNJ-55 Board Order, PCUA, of Approval dated 10/26/87

Appendix F

P-SWTR-10
1/18/90

DIRECT TESTIMONY

OF

JOSEPH MAURIELLO

*Prepared IMO SOLID WASTE TRANSFER AND RECYCLING, INC.

OAL Docket No. PUC 03173-88

August 1989

JOSEPH MAURIELLO

Q. CAN YOU TELL US YOUR NAME AND CURRENT ADDRESS?

A. My name is Joseph A. Mauriello. I reside at 42 Crest Drive, South Orange, New Jersey.

Q. CAN YOU TELL US, MR. MAURIELLO, YOUR EDUCATIONAL AND PROFESSIONAL BACKGROUND?

A. I have provided a vitae which is attached to this testimony and which I incorporate by reference.

Q. ARE YOUR FAMILIAR WITH THE COMPANY KNOWN AS SWT&R?

A. Yes. I have been involved with that company since its formation and involved with Mark Mauriello with the development of the Essex County Transfer Station project since May of 1986.

Q. CAN YOU TELL US WHAT YOUR ROLE WAS IN DEVELOPING THE ESSEX COUNTY TRANSFER STATION PROJECT?

A. My role was to assist Mark Mauriello in the development of financial data such as pro formas, price

projections and the like and in the development of negotiating positions with respect to various services that had to be purchased by SWT&R such as trucking, landfilling, and lease arrangements should that become necessary.

Q. DID YOU HAVE ANY RESPONSIBILITY IN CONNECTION WITH OBTAINING THE CAPITAL THE COMPANY NEEDED TO COMPLETE THE PROJECT?

A. Yes. One of my responsibilities was to obtain the necessary capital.

Q. CAN YOU TELL US, WITH RESPECT TO OBTAING CAPITAL, HOW YOU WENT ABOUT LOCATING CAPITAL FOR THE COMPANY?

A. Yes. I did not approach any conventional lending institutions since the structure of the transaction which was then being developed did not provide for collateral which I knew would be required by any conventional lender. Rather, financing was sought through private sources (such as clients of my accounting practice, friends and relatives) who ultimately, by the end of June 1987, had provided the company with commitments of funds in the approximate amount of $2,000,000. All of these funds to be provided on a debt basis to me and by me, in turn, to the company. Ultimately, those funds were provided to the company for repayment as follows:

> $1,350,000 payable on or before September 1, 1989, $1,350,000 payable approximately December 31, 1990, and the balance of $516,000 on or before the end of the project.

This repayment amount obviously accounts for a greater amount than the initial $2, 000, 000. The reason is that I loaned SWT&R an additional $1,350,000 in December of 1987. The interest rates agreed to for this borrowings were as follows:

On the $1,350,00 due September 1989, the rate of interest was 16 per cent until April 1, 1988 and thereafter 13 per cent until paid,

On the $1,350,000 due approximately December 31, 1990, the rate of interest was 16 per cent until April 1, 1988 and thereafter changing to prime plus 4 per cent, and on the remaining balance of $516,000 the interest rate was 13 per cent until repayment. The weighted average interest on all loans after April 1, 1988 approximated 13.5 percent.

Q. DID SWT&R OBTAIN FUNDS FROM ANY OTHER SOURCES TO SUPPORT THE PROJECT?

A. Yes. SWT&R did obtain certain equity capital through the sale of stock to Mark Mauriello, myself, Harold Martin, and Patsy Giordano, Jr. totalling $100,000. In addition, the company borrowed funds from Mark Mauriello in the amount of $170,000 at the rate of 13 per cent, which borrowing is repayable on or before the end of the project.

Q. HAVE FINANCIAL REPORTS BEEN PREPARED FOR SWT&R UNDER YOUR SUPERVISION FOR CALENDAR 1987 AND CALENDAR 1988?

A. Yes.

Q. WERE THOSE REPORTS PREPARED IN ACCORDANCE WITH THE BOARD OF PUBLIC UTILITY REQUIREMENTS ON A REPORT KNOWN AS AN ANNUAL REPORT?

A. Yes.

Q. WOULD YOU LOOK AT THE DOCUMENTS WHICH I HAVE MARKED P-15 AND P-16 AND TELL US IF YOU CAN IDENTIFY THOSE DOCUMENTS?

A. Yes. These are the Annual Reports prepared for the company by me for Calendar 1987 and 1988. In addition the documents include certain revisions recently made to the 1987 Annual Report.

Q. AS ACCOUNTANT FOR THE COMPANY, HAVE YOU PREPARED A STATEMENT REFLECTING THE SOURCES AND USES OF FUNDS FROM THE INCEPTION OF THE ESSEX COUNTY PROJECT?

A. Yes. I have prepared such a statement.

Q. WOULD YOU LOOK AT EXHIBIT P-17 AND TELL ME IF THAT IS THE SOURCE AND USE OF FUNDS STATEMENT PREPARED BY YOU?

A. Yes.

Q. CAN YOU TELL ME WHAT THAT STATEMENT DEPICTS IN TERMS OF THE FINANCIAL CIRCUMSTANCES OF THE COMPANY?

A. This statement reflects the use of all funds which came into the hands of the company and demonstrates clearly, I believe, that the price received by the company under this contract was barely adequate for the company to be in a position to meet its debts on a current basis.

Q. MR. MAURIELLO, HAVE YOU CALCULATED THE NUMBER OF MONTHS WHICH THE ESSEX COUNTY PROJECT MUST CONTINUE AT CURRENT LEVELS OF FLOW AND CURRENT PRICES IN ORDER FOR THE COMPANY TO BE IN A POSITION TO REPAY ALL OF ITS DEBT?

A. At current levels and prices, the Company is having extreme difficulty in repaying its debt and paying back stockholders, despite renegotiation of its contract with the processor, Environmental Waste Processing Inc.

As of December 31, 1998, there is a deficiency in assets to pay debt, if we recognize that the fixed assets of the Company will have no realizable value, since they consist largely of leasehold imnprovements, and to a much smaller extent investments in scales, computers, and office furniture and fixtures. The following tabulation shows the status as at December 31, 1988:

Realizable assets as at December 31, 1988:

Cash in bank	$ 513,616
Accounts receivable	1,131,049
Prepaid taxes	6,000
Deposits	967,469
Total realizable assets at December 31, 1989	$2,618,134

Liabilities payable as at December 31, 1988:

Accounts payable	$2,383,391
Accrued liabilities	580,568
Notes and loans payable	1,826,744
Total	$4,790,703
Stockholder capital stock investment to be recovered (without any return on investment)	100,000
Total	4,890,703
Deficiency in assets to pay debt and stockholder investment, to be defrayed from future operations	$2,272,569

The results of future operations are problematical, since the .daily tonnage through July, 1989 is below that of 1987 and 1998. Also, the Company has incurred Pennsylvania surtaxes that are not being

recovered in its rates and has experienced an increase in transportation charges.

The tabulation shows that the Company must make a profit before depreciation of $2,272,569 by September 1, 1990, the date as of which the Essex County incinerator is expected to be in operation. The required per-month predepreciation income amount for the 20 months from January 1, 1989 through September 1, 1990 is $113,628, or $1,363,536 for a 12-month period.

Q. DID THERE COME A TIME WHEN IT BECAME NECESSARY TO REVISE THE AGREEMENT BETWEEN SWT&R AND THE COMPANY ORIGINALLY KNOWN AS 442 WASTE MANAGEMENT, INC.?

A. Yes. That became necessary since the original contract price established with that firm assumed that the company would be processing 2,600 tons of waste per day and that has turned out to be far from the case. We have undertaken extensive negotiations with the owners of that company and with its accountant, Rueben Hunter, to attempt to arrive at a figure which would appropriately reflect the division of responsibility as between SWT&R and 442, and at the same time leave each of the companies with sufficient funds to meet their current obligations. I must repeat that this circumstance is in large part created by the serious deficiencies in the flow of waste to this facility which was designed and constructed to be a facility handling 2,600 tons per ton when in fact it is handling less than 1,200 tons per day.

The results of that re-negotiation, which are subject to Board of Director approval, have been to reduce the processing fee from $14.78 per ton to $11.16 per ton effective August 1, 1987 through July 31, 1989. In addition, the current understanding between the two companies is that there will be further negotiations to

establish the price to be in effect after July of 1989. I cannot say at this time whether the result of further negotiation will be a reduction or increase in the price paid by SWT&R for processing waste.

JOSEPH A. MAURIELLO

CONDENSED VITA

Joseph A. Mauriello is a certified public accountant and is senior partner of the public accounting firm, Mauriello, Franklin & Company, 358 South Orange Avenue, South Orange, New Jersey 07079. He has BS, MBA, and PED degrees from New York University in the fields of economics, finance, and accounting. He was Professor of Accounting at New York University (full professor for 24 years) and more recently at Seton Hall University before he retired as Professor Exeritus. He is a financial and accounting consultant to industry.

SOLID WASTE TRANSFER AND RECYCLING, INC.
STATEMENT OF CASH FLOWS FOR PERIOD AUGUST 1, 1987 TO DECEMBER 31, 1998.

Cash Flows from Operating Activities:		
Net loss from operations		$ (246,741)
Adjustments to reconcile net loss to net cash provided by operating activities:		
Depreciation and amortization	$ 1,279,229	
Changes in current assets and current liabilities:		
Increase in accounts receivable	(1,131,049)	
Increase in prepaid taxes	(6,000)	
Increase in accounts payable	2,383,391	
Increase in accrued rent, taxes and payroll	580,568	
Total adjustments		3,106,139
Net cash provided by operating activities		$ 2,859,398
Cash Flows from Investing Activities:		
Landfill-deposits	$ 700,000	
Landfill claims deposits	267,319	
Utility deposit	150	
Capital expenditures for tangible fixed assets	3,096,146	
Organization costs	208,911	
Net cash used in investing activities		(4,272,526)
Cash Flows from financing activities:		
Net borrowings on notes and loans	$ 3,273,466	
Principal repayments on borrowings	(1,446,772)	
Proceeds from issuance of common stock	100,000	
Net cash provided by financing activities		1,926,744
Net increase in cash		$ 513,616

APPENDIX G

Appendix G

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY
Office of the Commissioner
CN 402
Trenton, NJ 08652-0402

IN THE MATTER OF THE PETITION OF THE UNION COUNTY UTILITIES AUTHORITY FOR APPROVAL OF AN AMENDED AND RESTATED AGREEMENT FOR THE ACQUISITION OF AN UNDIVIDED INTEREST IN REAL PROPERTY, CONSISTING OF THE ACQUISITION OF CERTAIN EASEMENT AND LANDFILL RIGHTS	)	*ORDER* DOCKET NO. CT05930003

* * * * * * * *

Obligations of UCUA

As partial payment for the acquisition of the Easement, [Union County Utilities Authority ("UCUA")] will pay a "Base Purchase Price" of $2 million which will be deposited into the escrow fund. In addition, UCUA will pay a "Deferred Purchase Payment" for each calendar month during the term of the Empire Agreement. The Deferred Purchase Payment will equal the unit charge in place for the current month multiplied by the tonnage for the current month, plus, if applicable, uncontrollable circumstance costs, as defined by Section 10.2 of the Empire Agreement, for the current month. The monthly unit charge during 1994 will be $37 per ton. Beginning in 1995, the unit charge shall escalate yearly in accordance with the Consumer Price Index (Urban Area, Philadelphia), provided that the yearly increase shall not exceed 4%.

* * * * * * * *

The Empire Agreement, presented to the Department as a contract for a term of twenty years, clearly conflicts with the Department's well-established aversion to approval of long-term out-of-state disposal contracts. Approval of the Empire Agreement, as presented, could have subject to the Department to the claims that it was acting in violation of its own stated goals, in an *ultra vires* manner. The solution fashioned by the Department eliminates this concern. The two year approval granted by the Department does not contravene long-term planning goals, while providing a clearly delineated short-term solution. The Department notes that the conditions contained in this Order are similar to the conditions imposed on the agreement between the Passaic County Utilities Authority and Empire earlier this year in Docket No. CT03030001.

Accordingly, the Empire Agreement is *APPROVED AS MODIFIED* herein.

DATED:
January 14, 1994

s/s Jeanne M. Fox
Jeanne M. Fox, Acting Commissioner
Department of Environmental
Protection and Energy

Appendix H

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE APPLICATION OF SES GLOUCESTER COMPANY, L.P., FOR (1) APPROVAL OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, (2) A FRANCHISE, (3) AN INITIAL TARIFF, AND (4) THE ISSUANCE OF DEBT AND EQUITY	*INTERIM DECISION AND ORDER*

BY THE BOARD:

* * * * * * * *

10. *Miscellaneous Revenue Requirement Issues*

* * * * * * * *

. . . Accordingly, to assure that the tipping fee to be charged when the facility opens is based as much as possible on actual costs or up-to-date projections, there shall be utilized the Board approved costs in the "true-up" proceeding along with the rate of return and return on equity approved herein and the same methods of calculation and parameters as used herein, in order to develop the tipping fee actually to be charged when the facility opens. This tipping fee will then be adjusted annually at 100% of the Producer Price Index for finished goods in conformance with the proposal in SES Gloucester's current filing.

* * * * * * * *

The Board, having reviewed the Amended Petition and being satisfied that SES Gloucester is both willing and able to provide solid waste disposal services in Gloucester County, *HEREBY ORDERS*:

* * * * * * * *

3. That the preliminary initial tariff tipping fee rate of $44.95 per ton, based on the Amended Petition, is approved as juts and reasonable at this time, with the proviso that no less than three (3) months prior to the anticipated initial date of receipt of the franchise waste for shakedown of the resource recovery facility, SES Gloucester will file with the Board the final calculations of its currently projected costs, which final calculations, to the extent found reasonable, shall be utilized under the formula approved in the *Generic Order* and provided in the SES Gloucester filing herein, in computing the initial tariff which shall become the basis of its charges to the facility, to be adjusted annually in accordance with 100% of the Producer Price Index or by further order of the Board;

* * * * * * * *

DATED:
October 21, 1987.

BOARD OF PUBLIC UTILITIES
BY:

s/s George H. Barbour
GEORGE H. BARBOUR
COMMISSIONER

s/s Robert N. Guido
ROBERT N. GUIDO
COMMISSIONER

I abstain from voting on this matter.

s/s Barbara A. Curran
BARBARA A. CURRAN
PRESIDENT

ATTEST:

Ida Marie Englehardt
IDA MARIE ENGLEHARDT
ACTING SECRETARY

APPENDIX I

Appendix I

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES

IN THE MATTER OF THE APPLICATION OF THE PASSAIC COUNTY UTILITIES AUTHORITY FOR THE APPROVAL OF SOLID WASTE DISPOSAL CONTRACTS	))))))	*ORDER OF APPROVAL* BPU DOCKET NO. SO8704360

* * * * * * * *

BY THE BOARD:

* * * * * * * *

The estimated initial tipping fee pursuant to the Pen Pac contract is $65.98. The Board is persuaded that the public interest and the ratepayers of Passaic County will be served well by the approval of the contracts. The Board is aware that a tipping fee in the $65.00 range compares very favorably to other transfer station tipping fees that have been proposed for various northern New Jersey counties.

The legal criteria that must be met in the Board's consideration of the approval of these contracts are set forth in *In re Application of Saddle River*, 71 N.J. 14 (1976). The gravamen of the holding of that case is that if the Board is satisfied that the contract rate has been determined through the competitive interactions of the market place that the Board may accept and approve the contract in lieu of tariff. In accepting the contract as the tariff rate, the Board is not bound to determine rate base and rate of return.

* * * * * * * *

The petitioning Authority has demonstrated to the Board's satisfaction through competent evidence that Pen Pac and Chambers contracts were arrived at through competitive negotiations in the open market place and the Board will therefore,

ACCEPT AND APPROVE the contracts to govern as the lawful tariff rate.

* * * * * * * *

DATED:
October 26, 1987.

BOARD OF PUBLIC UTILITIES
BY:

s/s George H. Barbour
GEORGE H. BARBOUR
COMMISSIONER

s/s Robert N. Guido
ROBERT N. GUIDO
COMMISSIONER

President Barbara A. Curran voted against this application.

s/s Barbara A. Curran
BARBARA A. CURRAN
PRESIDENT

ATTEST:

Ida Marie Englehardt
IDA MARIE ENGLEHARDT
ACTING SECRETARY

No. 97-962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

SOLID WASTE TRANSFER & RECYCLING, INC.,
Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, THE COUNTY OF ESSEX, THE CITY OF NEWARK, NEW JERSEY, THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE AND WASTE MANAGEMENT OF NEW JERSEY,
Respondents.

On Petition for a Writ of Certiorari To The Superior Court of New Jersey, Appellate Division

BRIEF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION IN OPPOSITION TO PETITION FOR CERTIORARI

PETER VERNIERO
ATTORNEY GENERAL OF NEW JERSEY
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Hughes Justice Complex
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ANDREA M. SILKOWITZ
ASSISTANT ATTORNEY GENERAL
Of Counsel

CARLA VIVIAN BELLO
SENIOR DEPUTY ATTORNEY GENERAL
Counsel of Record and On the Brief

QUESTION PRESENTED

Does a state utility regulatory agency, consistent with the requirements of the Fifth and Fourteenth Amendments, have the right to reject an automatic rate escalator clause based on the Consumer Price Index (CPI) contained in a contract for solid waste disposal services where the solid waste utility fails to present evidence demonstrating the reasonableness of linking changes in solid waste disposal costs to changes in the CPI and also fails to present adequate cost of service data necessary to establish an alternative rate?

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COUNTERSTATEMENT OF THE CASE

The instant petition challenges an opinion of the Superior Court of New Jersey, Appellate Division, dated April 10, 1997 (Pa2)[1] in which the court addressed appellate challenges to a solid waste rate order issued by the New Jersey Department of Environmental Protection (Department). In its ruling, the court below affirmed in its entirety, the Department's order modifying Petitioner Solid Waste Transfer and Recycling's (SWTR) contract with the County of Essex (County) pursuant to which SWTR constructed and operated a solid waste transfer station for the County. Petitioner filed a petition for certification with the New Jersey Supreme Court which was denied on September 8, 1997.

The rate proceeding at issue began on July 16, 1987 before the New Jersey Board of Public Utilities (the agency vested with authority over solid waste utility operations prior to the transfer of such authority to the Department in 1991), with the County's application seeking issuance of a Certificate of Public Convenience and Necessity for operation of two solid waste transfer stations. In addition, the County sought Board approval of contracts it had entered into with two companies for the construction and operation of the solid waste transfer stations, Waste Management of New Jersey (WM) and Petitioner SWTR. The County further sought expedited interim approval of its application in light of a solid waste disposal crisis brought about by a court imposed August 1, 1987 deadline by which the County was to cease use of

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[1] "Pa" refers to the Appendix filed by SWTR with its Petition for Writ of Certiorari.

"DEPa" refers to the Appendix filed by the Department in the appellate proceeding below.

landfills located in the Hackensack Meadowlands District (Pa4 to Pa6).

In response to the County's emergent request, the Board, after hearing and by order dated July 31, 1987, approved initial, interim, emergent rates, subject to refund, for each of the two transfer station facilities (Pa6 to Pa7). The interim rates were $110.15 per ton for Type 10 municipal waste and $107.85 per ton for Types 13 (bulky), 23 (vegetative), and 27 (dry industrial) waste (Pa111). The case then proceeded to full hearings to determine the reasonableness of the contract rates.

During the course of the Board's rate investigation, the County supplemented its rate petition, seeking to include in rates CPI-based increases called for under the terms of its transfer station contracts (Pa43 to Pa44). With respect to SWTR, the CPI increases were 5.36 percent effective August 1, 1988 and 5.6 percent effective August 1, 1989 (Pa44). By order dated January 4,1989 (Pa43 to Pa44), however, the Board reaffirmed the interim nature of its initial rate approval and barred implementation of any CPI-linked rate increases pending final rate determination.

On February 10, 1989 a further Board order was issued by which the Board addressed a dispute arising over the applicable standard of proof. In that order the Board rejected sole application of a "competitive market" standard and directed that the case go forward before the assigned Administrative Law Judge (ALJ) on both a "competitive market" and a more traditional "cost of service" analysis (Pa46).

On December 26, 1990 the ALJ issued her Initial Decision (Pa58) in which she recommended approval of the transfer station operating contracts, including the CPI-based

escalator clauses.[2] The ALJ reasoned that the contracts were the result of "arms-length negotiations in a competitive market" and should be accepted by the Board (Pa146 to Pa168). The ALJ went on to state that, in view of her finding of a competitive market, it was not necessary to test the reasonableness of the proposed rates by more traditional rate making standards (Aa169, Aa192).

On August 8, 1991 the Board rejected the ALJ's Initial decision (Pa40). The Board found that: (1) SWTR had not met its burden of proof (Pa51); (2) the ALJ had failed to test the contract rates by way of a cost of service analysis in addition to the competitive market theory as the Board had directed (Pa46); and (3) a truly competitive market did not exist at the time of the County's negotiations with SWTR (Pa47 to Pa49). The Board further held that there had been no demonstration by SWTR that a CPI-linked automatic escalator clause reasonably reflected increases in costs associated with operation of a solid waste facility (Pa49 to Pa52). Finding no support for a CPI-based increase in rates above the interim level approved by the Board on an emergent basis, the interim rates, without CPI-based increases, were made the final rates (Pa56).

Following issuance of the Board's order, motions for reconsideration were filed. During the pendency of these motions, the Department succeeded to the solid waste regulatory authority formerly vested in the Board. After extensive briefing, oral arguments, and conferences, the Department rendered its final decision on reconsideration on August 23, 1994 (Pa26).

---

[2] This was contrary to Board Staff's recommendation to the ALJ that SWTR's rates be *reduced* by $10.72 per ton and that refunds with interest be made to customers (DEPa69).

In its August 1994 decision, the Department adopted the ALJ's view that a competitive market existed at the time the County negotiated its transfer station contracts. However, the Department did not view this fact as detracting from its responsibility to review the resulting contract rate for reasonableness. With specific reference to the CPI-based rate escalator, the Department stated its unequivocal agreement with the Board's earlier rejection of such clause absent a showing of a correlation between CPI cost components and costs associated with transfer station operation (Pa33). Consequently, the interim rates which the Board had set became SWTR's final rates.

On appeal to the Superior Court of New Jersey, Appellate Division, SWTR challenged the Department's order on a number of bases, the major ones being: (1) the Department's refusal to accept a competitive market analysis as sole support of the reasonableness of SWTR's contract rate; and (2) the Department's requirement that SWTR demonstrate a relationship between cost components of the CPI and costs associated with transfer station operations. On April 10, 1997, the Superior Court, Appellate Division issued its ruling affirming the Department's rate determination in its entirety.

On the issue of the rejection of SWTR's automatic CPI-based escalator clause, the Court, stated:

> SWTR knew or should have known from the outset in 1987 that [it was a public utility] and would function and be treated as such.
>
> * * *
>
> It is patently clear that the Board, and also the [Department] when it succeeded to the regulatory powers of the Board, had the authority to eliminate the applicability of the CPI-based automatic escalator

> clause of each contract. Each contract was subject to modification in the exercise of the overriding authority of the Board to act in the public interest.
>
> [Pa19 to Pa20]

Quoting from *In re Application of Saddle River*, 71 *N.J.* 14, 362 *A.*2d 552 (1976), the Court further emphasized that even municipal solid waste contracts arrived at by means of competitive public bidding are nevertheless subject to modification in the public interest (Pa18 to Pa19). Finally, the Court noted that both transfer station operating contracts:

> contained language which required them to be construed in accordance with and be governed by the laws of this State and we are satisfied that both contracts were entered into subject to the acceptance and approval of the Board. A specific clause to that latter effect is contained in the SWTR contract.
>
> [Pa19]

Rejecting SWTR's objections to the Department's requirement that a "nexus" be shown between CPI cost components and those commonly associated with transfer station operations, the Court remarked:

> A meaningful 'nexus' or connection must exist between the underlying cost factors (food, household goods, and electronic equipment) built into the CPI and the underlying cost factors (labor, transportation, depreciation, landfill and disposal costs) built into transfer station operation . . . so that the resultant rate after applying the CPI factor can be deemed just and reasonable.
>
> [Pa21]

Moreover, the fact that the CPI-based escalator clause was contained in a contract negotiated at arm's length in a competitive marketplace, was not viewed by the Court as compelling the ratemaking agency below to accept it at face value:

> While the County agreed that its taxpaying community would bear the added costs of CPI-based rate increases applied at the rate of 106% to the existing rate structure of each contract, it could not abrogate the Board's statutory responsibility to review and modify public utility contracts to insure a just and reasonable rate or charge.
>
> [Pa22]

Nor did the Court find that requiring a "nexus" between CPI cost components and transfer station costs was the announcement of a previously unknown "policy" requiring agency rulemaking, as argued by SWTR. Instead, the Court found that requiring that a "nexus" be shown was "merely another way of defining the burden, incumbent upon public utilities seeking an increase in rates to prove that proposed rates are just and reasonable" (Pa21). In addition, the Court stated that, contrary to assertions by SWTR, the Department's rejection of the contractual CPI-based adjustments was not "retroactive" since the CPI clauses "had never been finally accepted" by the State and the State retained its authority to modify solid waste contract rates "without exception" (Pa21).

Following issuance of the Court's opinion, a Notice of Petition for Certification was filed by SWTR with the Supreme Court of New Jersey on April 29, 1997. As previously stated, that petition was denied on September 8, 1997.

ARGUMENT

THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY PROPERLY APPLIED WELL-ESTABLISHED PRINCIPLES OF UTILITY RATE MAKING IN DETERMINING THAT THE STATE DEPARTMENT OF ENVIRONMENTAL PROTECTION CORRECTLY REJECTED PETITIONER'S PROPOSED SOLID WASTE UTILITY RATES FOR FAILURE TO PRESENT EVIDENCE SUPPORTING THE REASONABLENESS OF SUCH RATES AND NO SUBSTANTIAL CONSTITUTIONAL QUESTION THEREFORE EXISTS WARRANTING THE GRANT OF CERTIORARI BY THIS COURT.

Petitioner principally claims that the appellate court below failed to give consideration to the constitutional arguments raised in its challenge to the rate determination of the New Jersey Department of Environmental Protection. In attempting to support this contention, however, Petitioner has done little more than demonstrate a general dissatisfaction with the result reached by the Department and the reviewing court. Notwithstanding Petitioner's claims of confiscatory rates and retroactive impairment of contractual rights, the fact remains that it was Petitioner's own failure to present the data necessary to support the reasonableness of its proposed CPI-based rate adjustments which led to the rejection of such adjustments, rather than any constitutional infirmity in the legal analysis of the rate making agency or the reviewing court below.

While Petitioner cites *Duquesne Light Co. v. Barasch*, 488 *U.S.* 299 (1989) as support for the proposition that a rate

is too low if it is so "unjust" as to "practically deprive the owner of the property without due process of law" (Petition at p. 8), Petitioner fails to recognize that in *Duquesne* the Court also acknowledged that a state "does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in the service to the public.'" *Duquesne Light Co. v. Barasch*, 488 *U.S.* at 301. By the same token, a state does not "take" property simply because it disallows proposed rate increases which have not been adequately supported by the utility as reasonable.

With respect to SWTR's contention that its contractual rights were unconstitutionally impaired by the State's disallowance of the CPI-linked automatic adjustment clause, this Court long ago recognized that rates set by contract between regulated entities and private parties are subject to the overriding jurisdiction of the State. In *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 *U.S.* 372 (1919), this Court rejected arguments by the Union Dry Goods Company that a rate order issued by the Railroad Commission of Georgia deprived it of lower electric rates than those negotiated as part of an earlier private contract. In dismissing such argument and upholding the State's overriding authority to alter the contract rates, this Court stated, in language particularly applicable to the present circumstances, that

> except for the seriousness with which this claim has been asserted and is now pursued into this court, the law with respect to it would be regarded as so settled as not to merit further discussion. That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict has been often decided by this court.

[248 U.S. at 275]

This Court went on to cite a long line of similar and even earlier rulings on this issue, saying:

> These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the state.
>
> [*Id.* at 377]

It is a rudimentary principle of utility rate making that the burden is on a utility seeking approval of its rates to demonstrate by sufficient competent evidence the reasonableness of its proposal. *New Jersey Bell Telephone Co. v. Bd. of Public Utility Comm'rs*, 12 *N.J.* 568, 97 *A.*2d 602 (1954); *In re New Jersey Power and Light Co.*, 9 *N.J.* 498, 89 *A.*2d 26 (1952). Indeed, *N.J.S.A.* 48:2-21(d) specifically states that "[t]he burden of proof to show that the increase, change or alteration [in rates] is just and reasonable shall be upon the public utility making same. . . ."

In the present instance the burden was squarely upon SWTR to demonstrate the reasonableness of its requested rate increase, including its proposed CPI-linked escalator clause, regardless of whether such clause was in a tariff or a contract. It was a deficiency in SWTR's proofs, and not any alleged improper action by the Department, that resulted in the denial of SWTR's rate request and the affirmance of that agency decision by the court below.

In its Petition, SWTR restates its major objections to the rate determination of the Department, all of which were properly rejected by the reviewing court and none of which

rises to the level of an issue of public importance warranting this Court's review. SWTR's alleged "constitutional issues" are addressed below.

Rejection of Automatic CPI-linked escalator clause

SWTR contends that it was improper for the Department to reject the automatic CPI-linked escalator clause in its contract with Essex County because: (1) the clause was part of a contract arrived at by way of arms-length negotiations; (2) other contracts approved by the Department allegedly contain similar clauses; (3) the requirement of a "nexus" between components of the CPI and costs associated with transfer station operation was the articulation of a new policy; and (4) even with the application of the automatic escalator, rates at SWTR's facility would still be low in comparison with other facilities.

In light of this Court's own pronouncements acknowledging the sovereign authority of a State to override contract rates when necessary to protect the public interest, the Appellate Division properly affirmed the Department's rejection of an automatic CPI-linked escalator clause absent proof as to reasonableness.

The fact that escalator clauses may have been approved by regulators in other instances was found by the court below to be unpersuasive since "[e]ach case must rest upon its own peculiar facts." *Id.* Indeed, the escalator clauses referenced by SWTR had either been specifically tailored to reflect the cost components of each operation under review and made subject to periodic updates -- safeguards not part of SWTR's proposal

-- or were part of out-of-state contracts not subject to the Department's jurisdiction[3] (Pa34).

Similarly, the fact that SWTR's rates would or would not have been lower than those at other facilities, even with application of a CPI escalator, is not indicative of the *per se* reasonableness of such clause. The fact that a rate may be lower than that at another facility does not reflect the reasonableness of the profit, or "rate of return" realized by a facility's operator, unless there is also a comparison of the operating expenses at each facility. SWTR did not present a full record of its own operating expenses, let alone those of any other facility, choosing instead to rely solely on the alleged competitive nature of its contract negotiations.

Finally, SWTR's interpretation of the requirement of a "nexus" between the cost components of the CPI and the costs of operating a solid waste transfer station as a new policy is without merit. As the agencies and the reviewing court below found, the requirement that SWTR demonstrate a reasonable correlation between changes in the price of consumer goods and changes in costs associated with a solid waste transfer station operation, is no more than a requirement that SWTR meet its statutory burden of proving the reasonableness of its proposed rates.

---

[3] For example, in *In re SES Gloucester*, BPU Docket No. SE 85100984 (October 21, 1987, Pa216), the formula used was based upon the Producer Price Index, not the CPI, and each adjustment was made subject to further review. In *In the Matter of the Petition of Union County*, DEP Docket No. CT05503003 (January 14, 1994, Pa214), the adjustment clause at issue was contained in an out-of-state contract not subject to Department jurisdiction. A contract between a New Jersey solid waste utility (Pen Pac) and an out-of-state contractor (Chambers) was also the case in *In the Matter of the Application of Passaic County Utilities Authority* (BPU Docket No. S08704360 (October 26, 1987, Pa218).

Finally, it is most disingenuous for Petitioners to rely on *Permian Basin Area Rate Cases*, 390 *U.S.* 747, reh. den. 392 *U.S.* 917 (1968) for the proposition that the Department unconstitutionally severed the CPI-linked rate adjustment clause from SWTR's contract with the County. While the Court in *Permian Basin* refers to arguments raised by gas producers in reliance upon an earlier Federal Power Commission (FPC) decision, specifically *Pure Oil Co.*, 25 *F.P.C.* 383, wherein the FPC refused to declare unenforceable certain contractual adjustment clauses, the Court, in fact, upheld a contrary decision of the FPC in *Permian Basin*. The *Permian Basin* Court clearly stated that although the Natural Gas Act is "premised upon . . . private contracting . . . the Commission has plenary authority to limit or to proscribe contractual arrangements that contravene the relevant public interest." 390 *U.S.* at 784. Thus, *Permian Basin* supports, rather than detracts from, the validity of the rate determination below.

Alleged Failure on the Part of the Department to Set an Alternative Rate for SWTR Once CPI-Linked Escalator Clause Was Rejected

As previously noted, the burden of proving the reasonableness of a proposed rate is always upon the utility seeking the ratemaker's approval thereof. See *N.J.S.A.* 48:2-21(d). Indeed, where a utility has received rate approval despite its failure to present adequate supporting evidence, reviewing courts have not hesitated to reverse the ratemaker's decision. Thus, in *Public Service Coordinated Transport v. State*, 5 *N.J.* 196, 74 *A.*2d 580 (1950), an order of the then Board of Public Utility Commissioners authorizing a bus fare increase despite the utility's failure to present competent evidence of reasonableness, was rejected.

In the hope of obscuring this basic principle, however, SWTR attempts to shift its burden to the Department by creating an obligation on the part of the Department, once the CPI clause was rejected, to set an "alternative" rate for SWTR. What SWTR conveniently ignores, however, is that, by adopting SWTR's interim rate as the final approved rate, the Department set an alternative rate, albeit one not to SWTR's liking, but one which, in the expert opinion of the rate making agency, was the only rate supported by the record SWTR chose to create.

Even were the burden of proof not so unequivocally SWTR's, it would be fundamentally unfair to require the limited staff and resources of a regulatory agency to be applied towards making a case for a rate applicant who chooses to stand on a limited record. As is evident from the record herein, SWTR chose to present its competitively bid contract at face value and not present the data necessary for the agency to construct a cost of service case, despite notice in the Board's February 10, 1989 order that the case was to proceed under both a cost of service and competitive market analysis. Because SWTR would not, or could not, present evidence justifying its contract rate and automatic CPI adjustment clause in a traditional cost of service manner, the record was left with significant gaps. For example, in attempting to justify an alternative cost-based rate for SWTR, Department Staff had to work with SWTR's unaudited annual reports, financial statements that co-mingled landfilling expenses and subcontracted transportation costs, undelineated expenses attributable to certain contractual arrangements, and listings of salary expenses without delineation of corresponding duties (DEPa41 to DEPa70).

After grappling with these deficiencies in the record created by SWTR, Staff computed a rate significantly lower

than the interim rate ultimately adopted by the Department as the final rate for SWTR (Pa52 to 56). That the Department did not reduce SWTR's interim rate and order refunds as recommended by agency Staff can only be described as generous, in view of the limited nature of the data available from SWTR.[4]

Simply put, SWTR's theory that the burden is upon the ratemaker to create a record establishing an alternative rate for a utility that chooses to limit its proofs to a single rate making theory, is without support in statute or case law.

Alleged Unredressed Financial Risks Assumed by SWTR

SWTR contends that it assumed financial risks when it entered into the contract with Essex County which, absent application of the CPI or an "alternative" rate, will remain unredressed. As the Court below found, however, SWTR is a public utility and every public utility service contract is deemed entered into with knowledge of the sovereign power of the State to alter it (Pa18). Unlike a private vendor who can seek to maximize profits, a regulated entity is limited to a fair rate of return based upon proof as to the reasonableness of its rates. *Id.* While SWTR has obviously realized less profit than it would have liked, the fact remains that the

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[4] For SWTR to now argue that the agencies below accepted its operating expenses as reasonable (Petition at p.11) ignores the difficulty the State had in establishing such operating expenses in the first instance. The acceptance of SWTR's operating expenses merely supports the finding by the State that SWTR's interim rates, which reflected those expenses, should be made permanent. It has no bearing upon the reasonableness of the automatic CPI escalator. Nor does it explain SWTR's failure to prove the appropriateness of using escalations in consumer price index components to track increases in solid waste transfer station costs.

record it created did not support a higher charge for the services it rendered. Moreover, the Court below correctly observed that SWTR did not claim that its overall financial health has been jeopardized, only that it has not reaped the full extent of what it mistakenly thought was its bargain with the County (Pa24). To the extent that SWTR now attempts to portray itself as being in more severe financial distress, it is attempting to supplement the record and relitigate its rate case, an inappropriate use of a writ for certiorari.

In conclusion, Petitioners have presented no meritorious constitutional challenge to the decision entered below. The Department and the reviewing court based their determinations on the record created by SWTR. The fact that such record failed to support SWTR's proposed CPI based rates or any rates in excess of those set at interim levels, is SWTR's fault and not the result of any constitutional infirmity in the analysis of the Court below.

CONCLUSION

Petitioners set forth no important or special reasons for this Court to consider. For the foregoing reasons their Petition for a Writ of Certiorari should be denied.

Dated this 9th day of January, 1998.

Respectfully submitted,

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No. 97-962 (3)

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In The

Supreme Court of the United States

October Term, 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,

Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,

Respondents.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

BRIEF ON BEHALF OF THE COUNTY OF ESSEX IN OPPOSITION

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30 pp

QUESTIONS PRESENTED

I

In a proceeding to review the reasonableness of a public utility contract for the operation of a solid waste transfer station, does the State's rejection of an escalator clause providing for automatic rate increases exceeding the Consumer Price Index ("CPI") constitute a compensable taking where the utility has failed to establish a reasonable relationship between potential increases in the utility's operating costs and the CPI?

II

Did the State Board of Public Utilities effect a compensable taking when, in reviewing a utility contract that was expressly subject to acceptance and approval by the Board, it reasonably exercised its statutory authority to modify rates that were initially approved on an emergency basis?

III

Does the Fourteenth Amendment require the State to approve CPI-based enhancements in a public utility contract merely because it has approved CPI escalator clauses in other utility contracts arising out of materially different factual settings?

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BRIEF ON BEHALF OF THE COUNTY OF ESSEX IN OPPOSITION

Respondent, the County of Essex ("County"), respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by petitioner, Solid Waste Transfer & Recycling, Inc. ("SWTR"), seeking review of a decision by the Superior Court of New Jersey, Appellate Division. That decision is reported at 299 *N.J. Super.* 577, 691 *A.2d* 846 (App. Div. 1997).

COUNTERSTATEMENT OF THE CASE

I. Background

Prior to the mid-1980s, Essex County, New Jersey ("County") disposed of non-hazardous solid waste originating in the County at an in-state landfill operated by the Hackensack Meadowlands Development Commission ("HMDC") (A73).[1] Faced with the landfill's scheduled closure in 1987, the County undertook plans to develop a resource recovery facility ("RRF") as a long-term solution to its solid waste problems (*Id.*). Due primarily to construction delays, the RRF was not completed in time for the closure of the HMDC landfill (A80).

Consequently, in December 1986, the County issued a "Solicitation of Interest" inviting proposals for the establishment of one or more solid waste transfer stations in the County (A83-85). A transfer station is a facility at which collected solid waste is separated by category and

[1] The Respondent will cite to the materials contained within SWTR's appendix as (A___).

transferred to larger trucks for transport to out of state disposal sites (A74). *See, N.J.S.A.* 13:1E-3(r). Under New Jersey law, transfer stations are regulated utilities, and the County's Solicitation of Interest accordingly advised all potentially interested parties that any proposed transfer station would be subject to review and approval by the New Jersey Board of Public Utilities ("BPU" or "Board").

The Solicitation of Interest attracted the interest of SWTR, Waste Management of New Jersey ("WMNJ") and seven other members of the solid waste industry (A85). Over the first four months of 1987, the County examined the responses it had received, and narrowed the field of contenders down to SWTR and WMNJ (A99). Negotiations ensued, and on July 1, 1987, the County executed transfer station contracts with both SWTR and WMNJ (A110).

SWTR's contract obligated it to operate an "interim emergency facility" for the processing of the County's solid waste at its site in the City of Newark, commencing in August 1987 (A108-109). SWTR's contract established a base rate for services to be provided by SWTR, as well as a clause providing for annual adjustments of 106% of the "CPI" (A109). That rate, by direct operation of New Jersey law, was subject to the BPU's plenary authority to review the reasonableness of solid waste disposal rates. *N.J.S.A.* 48:2-13; *N.J.S.A.* 48:13A-4; *N.J.S.A.* 48:13A-7.

The BPU's regulatory jurisdiction over the Transfer Station Contracts is expressly set forth in Article 2.7 of the contract, captioned, "Agreement Conditioned Upon BPU Approval", which states:

> The parties hereto agree that the rights, duties and obligations imposed upon them herein are subject to and conditioned upon acceptance and approval of this Agreement by the BPU. Refusal of the BPU to accept and approve this Agreement shall be deemed to be an uncontrollable event . . . for purposes of determining the County's liability. . . .

(App. 5).[2]

II. Proceedings Below

On July 16, 1987, with closure of the HMDC landfill two weeks away, the County commenced emergent proceedings before the BPU seeking to obtain the necessary approvals to allow the County to move ahead with the development of three (later reduced to two) solid waste transfer stations (A59). As part of its petition, the County requested authorization to impose substantial new charges on county ratepayers, to fund the cost increases stemming from the SWTR and WMNJ contracts.

On July 31, 1987, after holding an expedited hearing, BPU issued an order approving the County's proposed tariff rates on an interim basis, and provisionally accepting the SWTR contract (A60). In its order, BPU noted "the emergent nature of the petition," and further expressly reserved its "rights to amend, change or rescind such provisions of this Order, as in its judgment, the public good may demand." (App. 12).

Several municipalities thereafter challenged SWTR's and WMNJ's transfer station rates. On May 2, 1988, BPU

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[2] The Respondent will cite to the materials contained within its appendix as (App.___)

transmitted the matter to the Office of Administrative Law ("OAL") for a plenary rate hearing (A60). Several months later, in an interlocutory decision addressing procedural issues, the BPU noted that the determination of the reasonableness of the tariff rates charged by the County is "integrally related to and dependent upon resolution of the question of the reasonableness of the underlying contracts," and ruled that "[a]s public utilities, the Transfer Stations must bear the burden of justifying the reasonableness of their rates, i.e., the services fees and charges for [the County] under the contracts." [A70-71].

To like affect, in an interlocutory order issued on January 4, 1989, BPU reiterated that the issues to be resolved in the administrative hearing included both the reasonableness of the County's tariff rate and the reasonableness of the Transfer Station Contracts (A68). In the order, the Board took pains to emphasize that its prior "acceptance" of the Transfer Station Contracts, had been on an "interim initial basis," and to remind all the parties that it had not yet made any determination as to the reasonableness of SWTR's service fees, including the CPI escalator clauses (A68).

The administrative rate hearing commenced in November 1989, consumed 34 hearing days, and concluded on April 27, 1990 (A65). By Initial Decision dated December 26, 1990, the Administrative Law Judge ("ALJ") found that the Transfer Station Contracts, although rising out of a solid waste emergency, were "the result of arms-length negotiations in a competitive market," and recommended that they be approved in their entirety (A168).

On review of the administrative record, BPU rejected the ALJ's recommendation insofar as it called for approval of annual automatic rate increases of 106% of the CPI (A49, A52). The BPU held that those increases had not been shown to be reasonable from a traditional rate making (i.e., rate base/rate of return) standpoint. In this regard, BPU noted that the components of the CPI – food, housing, and electronic goods – did not, on their face, appear to have a close correlation to the basic costs of a transfer station, namely, costs of depreciation, landfill disposal, transportation, return on investment, and salaries (A50). Although ruling that SWTR had not met its burden of proving the reasonableness of CPI-based rate increases it was seeking, the Board upheld the previously approved interim rates (A55-56), and otherwise accepted the SWTR contract.

SWTR thereafter moved for reconsideration of BPU's decision. While the motion was pending, the regulatory functions of the BPU were merged with the State Department of Environmental Protection, which was renamed the Department of Environmental Protection and Energy ("DEPE") (A14). After lengthy review proceedings, on August 19, 1994, DEPE's Commissioner issued a final agency decision affirming BPU's rejection of CPI-based rate increases, and declining to award SWTR any additional amounts (A38-39). The Commissioner stated:

> I am in complete agreement with the Board's rejection of the CPI-based automatic increases sought by . . . SWTR.
>
> * * *
>
> Only when an automatic adjustment clause has been specifically selected to reflect the type

> of costs under review, has its use been permitted . . . [T]he CPI clauses here (1) were not tailored in any way to reflect transfer station costs and (2) were not subject to any further ratemaking review or analysis. [footnote omitted.]
>
> . . . [T]he burden of proving every aspect of a rate's reasonableness is upon the utility . . . [R]equiring a solid waste utility to demonstrate a "nexus" between transfer station costs and the CPI . . . does no more than to hold WM[NJ] and SWTR to their burden of proving the reasonableness of their proposed rate . . . WM[NJ] and SWTR have failed to create a record supporting the reasonableness of automatic CPI-based increases. I therefore reject arguments raised by WM[NJ] and SWTR to the effect that the Board's reliance upon previous cases relating to automatic adjustment clauses was somehow unexpected and a denial of due process.

[A33-35].

SWTR thereafter sought review of DEPE's final decision in the Superior Court, Appellate Division. The Appellate Division, in a careful and unanimous opinion, affirmed, holding:

> The Board was not bound to accept the CPI-based automatic rate increase whether or not the clause was contained in a contract negotiated at arms length in a competitive market by . . . SWTR with the County. While the County agreed that its taxpaying community would bear the added costs of CPI-based rate increases . . . it could not abrogate the Board's statutory

> responsibility to review and modify public utility contracts to ensure a just and reasonable rate or charge. *N.J.S.A.* 48:13A-7. In this regard, neither the Board nor the DEPE abused their discretion or acted in an arbitrary, capricious or unreasonable manner.

[A22]. The Appellate Division also found that the Transfer Station Contract between the County and SWTR contained language requiring that it be construed in accordance with and be governed by the laws of the State of New Jersey, and that therefore, "WMNJ and SWTR knew or should have known from the outset in 1987 that they were public utilities and would function and be treated as such." (A19).

On May 12, 1997, SWTR sought discretionary review of the Appellate Division's decision in the Supreme Court of New Jersey. Finding no issues of substantial public importance, the Supreme Court denied SWTR's petition (A1).

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE SWTR'S CLAIM OF AN UNCONSTITUTIONAL TAKING IS WITHOUT MERIT.

I. Summary of Argument

In urging the Court to grant certiorari, petitioner asserts that the BPU and DEPE, by rejecting the CPI provision contained in its Transfer Station Contract, deprived petitioner of its "property" in violation of the

Fifth and Fourteenth Amendments. For this reason, petitioner contends, it is entitled to "just compensation" and asks this Court to remand the matter for entry of judgment in its favor in the amount of $3,427,493 plus interest.

This argument fails on its face to raise an issue worthy of review by this Court, since it involves a narrow, fact-sensitive issue of local interest only. The argument is also, on its own terms meritless, since the orders of the BPU and DEPE, as affirmed by the Appellate Division, accord with well settled principles vesting the BPU with the plenary authority to review and modify public utility contracts. The decisions below are entirely consistent with this Court's "takings" decisions, since the record resoundingly fails to support petitioner's assertion that the regulatory rejection of the CPI escalator clause resulted in an inadequate return on its investment.

In a rhetorically overblown effort to cast itself as a champion of the rights of private investors, petitioner claims to have received an "unconstitutional raw deal" (Pb17). The reality is that, in the course of an exhaustive administrative hearing, petitioner simply failed to justify the above CPI escalator clause provision contained in the Transfer Station Contract, and was unable to show that the clause bore a reasonable connection to the operating costs of the transfer station. Petitioner's "takings" arguments, are not only unsupported by the factual record, but are at odds with a substantial body of public utility law recognizing the broad authority of States to regulate, in the public interest, the reasonableness of utility rates. Since the decision of the Appellate Division is well-reasoned and soundly based on uncontroversial law, the petition for certiorari should be denied.

A. The Regulatory Orders at Issue Did Not Deprive Petitioner of Its Property Without Due Process of Law in Violation of the Fifth and Fourteenth Amendments.

Petitioner does not dispute the plenary jurisdiction of the BPU to review the reasonableness of solid waste disposal rates in public utility contracts. *N.J.S.A.* 48:2-13; *N.J.S.A.* 48:13-A4; *N.J.S.A.* 48:13A-7. *In re Public Service Electric and Gas Co.*, 35 *N.J.* 358, 371, 173 *A.2d* 233 (1961). The Transfer Station Contract itself – including its CPI provision – was, by its express terms, subject to and conditioned upon approval by the BPU (App. 5).

In carrying out its statutory responsibility to review the reasonableness of the Transfer Station Contract rates, the BPU was obligated to scrutinize the administrative record to determine whether petitioner proved, by a preponderance of the credible evidence, whether the rate increases called for by the contract's CPI clause was justified. Concluding that they were not, BPU acted well within the ambit of its statutory discretion to modify the contract by eliminating the escalator clause. The orders of the BPU and the DEPE were not only supported by a careful review of the factual record, they were also bolstered by numerous decisions disfavoring utility rate increases tied to general inflationary factors. *See, e.g., Petition of Elizabethtown Water Co.*, 11 *N.J.A.R.* 303, 337 (OAL 1984), *rev'd on other grounds*, 205 *N.J. Super.* 528 (App. Div. 1985), *aff'd as modified*, 107 *N.J.* 440, 527 *A.2d* 354 (1987); *Re Jersey Central Power and Light Co.*, 65 *PUR 4th* 175 (N.J.B.P.U. 1985); *Re Commonwealth Water Co.*, 7 *PUR 4th* 456 (N.J.B.P.U. 1974); *cf., In re Otter Trail Power Co.*, 21 *PUR 4th* 254 (S.D.P.U.C. 1977).

Petitioner's one-dimensional focus on its asserted (and wholly artificial) operating deficit does not and can not undermine the well-supported finding that SWTR failed to carry its burden of demonstrating that the CPI escalator clause was reasonably related to the transfer station's operating costs. In its attempt to create a constitutional issue where none exists, petitioner disregards its own failure to present any proofs on this issue and ignores the established authority of the BPU to review and revise public utility contracts in the interest of the public. Indeed, the entire thrust of petitioner's argument appears to be based on the flawed proposition that the reviewing agencies were required to accept the CPI provision on a *carte blanche* basis without any regard for whether SWTR carried its burden of proving that the provision was reasonable and justified under the circumstances.

While it is axiomatic that a governmentally-fixed rate confining a public utility's return from operations to an amount below the point of confiscation violates due process, *Denver Union Stock Yard Co. v. United States*, 304 *U.S.* 470, 475 (1938), it is also well settled that a company operating in a heavily regulated field such as the solid waste industry need only "be permitted a return sufficient to assure its financial health." *State Farm Mutual Automobile Ins. Co. v. State*, 124 *N.J.* 32, 48, 50, 590 *A.2d* 191 (1991). Similarly, it is an established principle of public utility law that "[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investor's interests provide only one of the variables in the constitutional calculation of reasonableness." *Permian Basin Area Rate Cases*, 390 *U.S.* 747,

769 (1968), (*citing Covington & Lexington Turnpike Co. v. Sandford*, 164 *U.S.* 578, 17 *S. Ct.* 198 (19___).

In this case, the record well supports BPU's, DEPE's, and the Appellate Division's findings that the CPI increases sought by the petitioner were unreasonable and excessive. The record yields a financial picture remarkably at odds with the portrait SWTR seeks to paint in its petition. To take the most glaring discrepancy, SWTR fails to acknowledge, anywhere in its papers, that its supposed "deficit" stemmed wholly form its gross undercapitalization. With an initial capitalization of $100,000 in common stock against $3.27 million in "notes payable" to the company's own shareholders, SWTR's debt to equity ratio exceeded 30:1. Since the shareholder "notes" were payable at rates of up to 16%, it comes as no surprise that the company would "show" a deficit in the early years of its operation.

Moreover, petitioner's assertion that it could have "shown a profit" of $704,924 during the first three years of its operation if the CPI increases were allowed is substantially, if not completely, undermined by the fact that SWTR held a five year lease with a company owned by one of its principals, in which SWTR agreed to pay above-market rent of $900,000 per year. At the administrative hearing, the County's real estate expert testified that the fair net rental value of the leased property under a comparable sales approach was $129,000 per year, or $750,000 less than SWTR had agreed to pay. Indeed, SWTR's own rebuttal witness testified that under a cost approach the fair net rental value of the property was $657,000 per year – still nearly $250,000 below the annual rent under the lease agreement. That the BPU declined to

disturb the ALJ's acceptance of SWTR's lease expense does not alter the economic reality that rent payable under the lease – not BPU's denial of requested CPI increases – was, by itself, a major factor in SWTR's alleged "deficit."

The overall picture that emerges from the first three years of petitioner's operation is that its five shareholders were able, on the strength of an investment of roughly $3.4 million, to generate gross receipts well in excess of $80 million. From this amount, the shareholders were able to make payments to themselves on their "notes" and in salaries, and pay above market rent to another company in which a principal of SWTR was an owner. On this record, DEPE acted well within the ambit of its regulatory discretion by finding that the CPI increases sought by petitioner were unreasonable and excessive.

Because the record is devoid of any evidence that the BPU's elimination of the CPI increases sought by petitioner resulted in the setting of a rate below the point of confiscation, the BPU's actions were fully consistent with the requirements of due process. Petitioner's reliance on *Duquesne Light Co. v. Barasch*, 488 *U.S.* 299, 307 (1989) (utility commission is constitutionally prohibited from setting a rate that is confiscatory of the utility's property rights) is unavailing in this matter, since none of the facts which petitioner has chosen to highlight satisfy any of the individual criteria contained in *Duquesne*.

B. Modification of the Transfer Station Contract by the BPU Was Undertaken Pursuant to the Express Terms of the Contract and the BPU's Lawful Regulatory Authority.

Petitioner next offers a variation on its "taking" theme, arguing that because it allegedly caused SWTR to

operate in a deficit, BPU's rejection of the CPI escalator clause in the Transfer Station Contract resulted in a deprivation of its property for which petitioner is entitled to receive just compensation. The short response to this assertion is that the concept of "just compensation" is not even remotely at play where a state, in the lawful exercise of its regulatory authority, has appropriately modified a public utility contract on the ground that the contract contained a rate which was found to be excessive and unreasonable.

In making this assertion, petitioner ignores the fundamental principle that a contract with respect to public utility rates is "conclusively deemed to be made with knowledge and in contemplation of the sovereign power of the state to alter it." 73B *C.J.S.* "Public Utilities" at 164. More importantly, as noted above, that longstanding principle is expressly embodied in the Transfer Station Contract itself, which provides that the agreement is "subject to and conditioned upon the acceptance and approval of the BPU." Hence, BPU's initial order implementing the contract on an emergent and interim basis was clearly subject to modification at the conclusion of the rate proceeding.

Petitioner was fully aware, when it executed the Transfer Station Contract, of the existence of the State's sovereign regulatory jurisdiction and authority to amend the contract in question. *In re Application of Saddle River*, 71 *N.J.* 14, 23, 362 *A.2d* 552 (1976); *N.J.S.A.* 48:13A-7 (where BPU determines that rates or charges received for solid waste disposal services are excessive, "it may order the person charging such excessive rates or charges to make an adjustment in the tariff or contract to a sum

which shall result in just and reasonable rates or charges."). As pointedly noted by the DEPE Commissioner in his Order, "it is difficult to ascertain what purpose further rate proceedings would have served" had the contract not been subject to adjustment upon execution (A37). Hence, petitioner's assertion that it was denied the benefit of its contract because BPU rejected the CPI provision after petitioner performed under the contract utterly ignores the obvious and compelling fact that the Transfer Station Contract was entered into on an interim, emergent basis subject to BPU approval.

Finally, the argument that petitioner is entitled to just compensation in the circumstances presented here would, if carried to its logical conclusion, effectively eliminate the authority of the BPU to adjust utility contracts so as to set rates which are reasonable.

C. Petitioner's Allegation of "Disparate Treatment" in Connection With Prior Decisions in Which the State Approved CPI-Linked Adjusters is Meritless.

Petitioner finally argues that because of determinations by the State upholding CPI-linked increases in three other instances, the rejection of CPI increases under the contract at issue here constituted "disparate treatment," for which, in petitioner's view, the State must demonstrate a "rational basis." Putting aside the obvious lack of any authority for this proposition, the three decisions upon which petitioner has chosen to focus actually serve to confirm the reasonableness of the State's decision to reject the CPI escalator clause in this case.

In *In re Petition of Union County Utilities Authority*, Docket No. CT 05930003 (Petition, Appendix G), DEP substantially rejected a 20 year contract under which ash residue from the Union County incinerator was to be landfilled at an out-of-state facility, but conditionally approved the contract for a 5 year period only. The contract in question contained a CPI escalator that was delayed in its implementation until the third year of the contract and was subject to an absolute cap of 4%. In contrast, petitioner's CPI escalator clause in this case was not delayed in its implementation and, so far from containing a cap, called for increases in *excess* of the CPI. The notable differences between the two clauses demonstrate the rationality of the agency's differing reactions to them.

The second case invoked by petitioner, *In re Passaic County Utilities Authority*, BPU Docket No. 508704360 (A218-219), is even less helpful to petitioner. From the text of the decision, it is impossible to ascertain what the terms of the escalator clause may have been. What stands out is that the approval of the contracts in question was specifically conditioned upon the requirement that financial information be furnished to the agency "each time new rates are filed or annually adjusted pursuant to the contract" (*Id.*). This resolution is perfectly consistent with the agency decision in this case. Ironically, the tipping fees in the *PCUA* case were "in the $65.00 range," which BPU pointedly noted "compares very favorably to other transfer stations tipping fees that have been proposed for various Northern New Jersey counties" (A218) – such as the $100+ fees to which the Transfer Station Contract gave rise.

Finally, petitioner's reliance on the factually remote decision in *In re SES Gloucester*, BPU Docket No. SE 85100984 (A216-217), is likewise unavailing. In that case, the BPU approved a 20 year rate formula for a resource recovery facility which included a formula for adjustments based upon changes in the Producer Price Index (PPI) (A34). As the DEPE Commissioner observed in his final decision in this matter, the agency's "approval" of the escalator clause in *In re SES Gloucester*, such as it was, was made expressly subject to "further Board review of each increase" (A34). Since the CPI clauses at issue here were not tailored to reflect transfer station costs and were not subject to any further ratemaking review or analysis, they were found to be factually distinguishable.

Accordingly, the decisions below are fully consistent with each of the three decisions discussed above. For this reason, petitioner's claim of "selective enforcement" must fail.

CONCLUSION

The Transfer Station Contract at issue in this matter was entered into by petitioner with full knowledge that it was approved on an interim, emergent basis, and was subject to the jurisdiction of the BPU in its sovereign capacity to review and, if justified, modify the contract in the interest of the public. Petitioner was provided with a full and fair opportunity at an administrative hearing to present proofs of the reasonableness of the CPI clauses contained in the contract. Petitioner failed to meet that burden. In reviewing the ALJ's initial decision, both the

BPU and the DEPE considered the factual record at length and, in light of well established precedent, correctly concluded that petitioner had failed to demonstrate a nexus between the operating costs associated with the transfer station and the CPI-based escalator clause contained within the contract. Accordingly, there is no constitutional infirmity in the decisions of the BPU and the DEPE.

That petitioner allegedly operated in a "deficit" was neither caused by the decisions of the regulatory agencies involved nor ignored by the Appellate Division and the Supreme Court of New Jersey when petitioner unsuccessfully attempted to raise before those tribunals the due process arguments it has rehashed before this Court. Accordingly, respondent Essex County respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

DeCotiis, Fitzpatrick & Gluck
Benjamin Clarke
Counsel of Record

Matthew R. Gabrielson
Lisa R. Halperin

APPENDIX

AGREEMENT FOR THE TRANSPORTATION AND DISPOSAL OF SOLID WASTE

THIS AGREEMENT FOR THE TRANSPORTATION AND DISPOSAL OF SOLID WASTE, made this 1st day of July, 1987 by and between SOLID WASTE TRANSFER AND RECYCLING, Inc., a New Jersey corporation (the "Transporter"), and THE COUNTY OF ESSEX, New Jersey, a body corporate and politic of the State of New Jersey ("County"),

WITNESSETH:

WHEREAS, pursuant to the New Jersey Solid Waste Management Act, County is charged with the responsibility of adopting a Solid Waste Management Plan to provide for the disposal of Solid Waste generated within the Essex County Solid Waste Management Planning District; and

WHEREAS, Transporter was created for the purpose of constructing, operating and owning Transfer Stations (as defined below) and transporting and disposing of Solid Waste received at such Transfer Stations; and

WHEREAS, Transporter has made certain representations and covenants with respect to Transporter's ability to perform such services within the County of Essex with respect to certain

* * *

ARTICLE II

TRANSPORTER SERVICES

2.1 *Construction and Operation of Transfer Stations and Disposal of Solid Waste.* For and in consideration of the fees set forth in articles III and IV and the covenants of the County herein, Transporter will construct or make all necessary capital improvements upon the Transfer Stations, will supply all equipment and personnel necessary to operate the Transfer Stations and to transport Solid Waste generated or deemed to be generated in Essex County to out-of-state disposal facilities according to the terms hereof, will obtain all necessary Permits and will provide all services relative to the operation of the Transfer Stations and to the transportation of Solid Waste, and all obligations and services as are more fully described in the Proposal as modified in the permits issued by DEP and BPU during the period of Interim Emergency Services and the period of Permanent Services. Transporter shall have the sole responsibility for, and and pay all costs attendant to disposal of solid waste in out-of-state disposal facilities.

2.2 *Term of Services.* Transporter agrees to commence providing Interim Emergency Services at 442 Frelinghuysen [sic] Avenue, Newark, New Jersey on August 1, 1987 and to transport Solid Waste received during Interim Emergency Services for disposal in out-of-state disposal facilities. Such Interim Emergency Services shall continue until the earlier of August 1, 1988 or the issuance of occupancy permit for the Transfer Station facility necessary to provide Permanent Service at 442

Frelinghusen [sic] Avenue, Newark, New Jersey. Permanent Service shall commence at Hill Street, Orange, New Jersey upon completion of that Transfer Station Facility.

Thereafter the Transporter shall provide Permanent Services to the waste generators which are directed to deliver Solid Waste to the Transfer Stations for the lesser of (i) five (5) years from the Commencement Date or (ii) Commercial Operation of the Facility.

The County may, at any time after startup of the Facility, and upon written instructions to Transporter, decrease the number of Tons of Acceptable Waste to be received at the Transfer Station so as to enable delivery of the same to the Facility. Solely for the purposes of this section, "Acceptable Waste" shall mean that term as defined in Section 1.01 of the Service Agreement by and between American Ref-Fuel Company of Essex County and the Port Authority of New York and New Jersey, dated February 28, 1986.

Upon Commercial Operation of the Facility, the Transporter shall provide those services described in Section 2.1 above at 442 Frelinghuysen Avenue, Newark, New Jersey for Solid Waste type 13 which is generated within the communities specified in the June 3, 1987 Solid Waste Management Plan Amendment until August 1, 1997.

2.3 *Nondelegability.* The services and obligations of Transporter may not be delegated or transferred to any Person without the prior express written agreement of County to such delegation or transfer. Transporter may enter into agreements for provision of services with

respect to fulfillment of Transporter's duties and obligations hereunder.

2.4 *Exclusivity.* Transporter shall use its best efforts, subject to Section 6.3, not to receive any Solid Waste at the Transfer stations other than Solid Waste generated or deemed to be generated within the County as provided in Section 6.3 by the residents and commercial, institutional and industrial establishments located within the boundaries of the County and which has been directed to the Transfer Stations pursuant to the waste flow orders of the Governmental Body with jurisdiction over waste flows during the term of this Transportation Agreement. Transporter shall be entitled to rely on waste origin documents supplied by Solid Waste collectors upon making deliveries to the Transfer Stations in satisfying its best efforts obligation to exclude Solid Waste other than Solid Waste generated or deemed to be generated in the County, except to the extent that Transporter knows or should know of the origin of such Solid Waste.

2.5 *Calculation of fees.* Transporter shall calculate the amount of Solid Waste delivered to the Transfer Stations by the haulers and generators of Solid Waste generated or deemed generated in the County based upon the difference in the weight of the delivery vehicles as weighed before and after the delivery of Solid Waste, and transporter shall charge for each ton of Solid Waste received at the Transfer Stations the Tipping Fee from such haulers and generators pursuant to articles III and IV hereof.

2.5.1 *Weighing of Deliveries.* Transporter shall maintain weighing facilities at the Transfer Stations for the purpose of providing its services under Section 2.5. Transporter, at its cost and

expense, shall test and recalibrate the scales as often as may be required by Applicable Law. Either Transporter or County may request more frequent testing of the scales at the requesting party's cost and expense. If at any time testing of the weighing facilities indicates that the scales do not meet New Jersey Bureau of Weights and Measures accuracy requirements, any adjustments of scale records actually recorded during the preceding thirty (30) days shall be negotiated by County and Transporter. The County will have the right to maintain personnel at the Transfer Stations to oversee weighing and other operations of the Transporter.

2.5.2 *Weight Records.* Transporter shall maintain a weight record containing the weight, date, time and vehicle identification of each vehicle entering and exiting the Transfer Stations.

2.6 *Right of Assignment.* The County shall have the right to assign its interest in, and rights and obligations under this Transportation Agreement to any public body implementing or otherwise responsible for a plan for the disposal of Solid Waste in the County. The County shall remain concurrently obligated with its assignee under this Transportation Agreement after such assignment.

2.7 *Agreement Conditioned upon BPU Approval.* The parties hereto agree that the rights, duties and obligations imposed upon them herein are subject to and conditioned upon the acceptance and approval of this Agreement by the BPU; provided, however, that the obligations of the County under Section 9.1.3 of this Agreement shall not be approved and accepted by the BPU. Refusal of the BPU to accept and approve this Agreement shall be deemed to be

an Uncontrollable Event described in subsections (b) and (c) of the definitions for purposes of determining the County's liability under Section 9.1.3 of this Agreement.

2.8 *Agreement Subject to Approval by the Board of Freeholders.* The parties hereto understand and agree that the rights, duties and obligations of the parties hereto are subject to, and the effectiveness of this Agreement is conditioned upon, approval and acceptance of this Agreement by the Essex County Board of Freeholders. The parties further agree that should the Essex County Board of Freeholders fail to accept and approve this Agreement by resolution on or before July 8, 1987, this Agreement shall become null and void and neither party shall have any liability to the other.

(LOGO)

STATE OF NEW JERSEY
BOARD OF PUBLIC UTILITIES
TWO GATEWAY CENTER
NEWARK, N.J. 07102

SOLID WASTE

IN THE MATTER OF THE PETITION OF THE COUNTY OF ESSEX FOR A FRANCHISE AND APPROVAL OF CONTRACTS WITH SOLID WASTE TRANSFER AND RECYCLING, INC., AND WASTE MANAGEMENT OF NEW JERSEY INC. AND THE CO-APPLICATION OF ESSEX COUNTY SOLID WASTE TRANSFER AND RECYCLING, INC., FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY,	ORDER DOCKET NO. SE87070552

David Gartenberg on behalf of the Staff of the Board of Public Utilities.

Gordon, Gordon and Haley, by Michael Gordon, Esq., 30 Main Street, West Orange, New Jersey 07052, for the City of Orange.

Riccardelli, Gasiorowald and DeMassi, by Michael F. Riccardelli, Esq., 31 Park Street, Montclair, New Jersey 07042, for Solid Waste Transfer and Recycling, Inc.

H. Curtis Meanor, Esq., Acting County Counsel Norman Schulaner, Esq., Assistant County Council, County of Essex, Hall of Records, Dr.

Martin Luther King, Jr. Boulevard, Newark, New Jersey 07102, for Essex County.

Schwartz, Tobia and Stanziale, by Theordore A. Schwartz, Esq., 22 Crestmont Road, Montclair, New Jersey 07042, for Waste Management of New Jersey.

Sills, Beck, Cummis, Zuckerman, Radin, Tischman and Epstein, by Cecil J. Banks, Esq., 33 Washington Street, Newark, New Jersey 07102, for the City of Newark.

BY THE BOARD:

By petition filed on July 20, 1987, the County of Essex requested: (1) approval of a franchise for resource recovery and the operation of three transfer stations which was granted by the Board on July 27, 1987; (2) approval of contracts with Solid Waste Transfer and Recycling, Inc., for the operation of a transfer station at 442 Frelinghuyman Avenue, Newark, New Jersey, which will be operational on August 1, 1987; for a transfer station located at Hill Street, Orange, New Jersey, which will be operational upon completion at a future date and with Waste Management of New Jersey, Inc., for the operation of a transfer station at 100 Avenue A, Newark, New Jersey, which will be operational on August 1, 1987; and (3) approval of a Certificate of Public Convenience and Necessity.

Based upon an evaluation of the submission by staff, the evidentiary and public record developed at the public hearing held on July 28, 1987 and the emergent nature of the petition, the Board *HEREBY ACCEPTS* the contracts and *ORDERS* the following:

1. The Motion to Intervene of the City of Newark is granted.

2. The Motion to Intervene of the City of Orange is granted.

3. The Motion to Adjourn the proceeding by the City of Orange is denied for the following reasons: a solid waste emergency exists, i.e., the closure of the Meadowlands, the necessity of alternative disposal by August 1, 1987. In addition, it must be emphasized that these rates are interim and subject to refund.

4. The Certificate for the transfer stations at 442 Frelinghuyson Avenue and Avenue A in Newark, and the Certificate for the County, identified as SW No. 9019, to the County of Essex; SW No. 9019 Sub 1 to Waste Management of New Jersey, Inc.; SW No. 9019 Sub 2 to Solid Waste Transfer and Recycling, Inc., and SW 9019 Sub 3 to Multistate Intermodel Systems, Inc., subject to DEP approval of the registrations are approved. Multistate Intermodel Systems, Inc., is the company that will be responsible for transporting solid waste material on behalf of Solid Waste Transfer and Recycling, Inc.

5. The interim, initial, emergent tariff rate for the County shall be the actual proposed rates of $100.15 for Type 10 waste and $107.85 for Types 13, 23, 25 and 27 waste, subject to the following amendments to the County's tariffs:

   a. in the event that scales are not operational at the transfer station rates shall

be charged on a cu. yd. basis using a 3.3 compactor ratio.

b. All collectors are to be allowed to dump up to August 7, 1987, whether or not they have paid in advance for this privilege. Each collector by 1:00 p.m. August 7, 1987, must have paid for its prior dumping costs, its August 7, 1987, estimated dumping and its next two days dumping costs. After August 7, 1987, the collectors must pay for dumping privileges one day in advance. The County is also directed to have a representative at each transfer station, during open hours, to accept payments on a pay-as-you-go basis for a two-week period.

c. Each collector shall be required to have a two-week advance payment account with the County within 6 months. The account is to be funded in 12 equal installments due the 16th and 1st of each month beginning August 16, 1987.

d. No advance payments or deposits are to be required from municipalities.

6. Staff is directed to meet with all interested parties to examine the entire solid waste situation in Essex County, including the rate, and report back to the Board by October 1, 1987, with recommendations for further action, and if warranted staff is directed to send a letter to the Division of Community Affairs requesting assistance for municipalities that may need help in getting emergency funds to pay for dumping at the transfer stations.

7. Collectors are authorized to collect on an advance, interim basis, subject to refund, the rate increase occasioned by the County's rate. Procedures, similar to those used for the Labor Contract, are hereby authorized by the Board, including petitions within 10 days, backup material within 30 days, an effective date of August 1, 1987, and rates effective upon acceptance of filed tariffs by the Board. Collectors that have labor cases will be allowed to get two interim increases if they have already filed their Labor tariffs. However, the final rates for Labor and the Essex rate will be consolidated and no additional rate case expenses will be allowed for the Essex rate over those allowed for the Labor cases. Staff is directed to send a letter to all collectors outlining the appropriate procedures.

The County shall bill all customers as required by the *New Jersey Administrative Code* 14:3-7, *et seq.*, and additionally shall include the following information on all billings:

- Type of and frequency of service;
- Tariff rate applied;
- Number and size of containers, where applicable;
- Total quantity of waste collected;
- A separate line item showing the surcharge applied as required by the Recycling Act, *N.J.S.A.* 13:1E-92 *et al.*

Operations authorized herein are subject to the rights and duties of public utilities as set forth in Title as *New*

Jersey Statutes Annotated and the *New Jersey Administrative Code* applicable to public utilities.

This Order shall not limit, prevent or in any manner affect the authority of the Board or State to institute any proceeding, civil, criminal, regulatory, or administrative, in any federal or state court or agency with respect to anti-trust, monopoly, restraint of trade issues, "fitness to serve" or other activities of the parties to this proceeding. Nor shall this Order limit, prevent or in any manner affect the authority of the board or State to consider anti-trust, monopoly, restraint of trade activities, "fitness to serve" or other issues in any proceeding brought before the Board, or any federal or state court or agency.

Should the fitness to serve of Solid Waste Transfer and Recycling, Inc. or Waste Management of New Jersey, Inc., and Multistate Intermodel Systems, Inc., be successfully challenged in any legal and/or administrative proceeding, or should, Solid Waste Transfer and Recycling, Inc., or Waste Management of New Jersey, Inc., and Multistate Intermodel Systems, Inc., or its owners, directors, officers, or employees be found to have violated any statutory or regulatory provision, the Board hereby reserves its right to amend, change or rescind such provisions of this Order, as in its judgment, the public good may demand.

DATED: July 31, 1987

BOARD OF PUBLIC UTILITIES

BY: /s/ Barbara A. Curran
BARBARA A. CURRAN
PRESIDENT

/s/ George H. Barbour
GEORGE H. BARBOUR
COMMISSIONER

/s/ Robert N. Guido
ROBERT N. GUIDO
COMMISSIONER

ATTEST:

/s/ Ida Engelhardt
IDA ENGELHARDT
ACTING SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utility Commission.

/s/ Blossom A. Peretz
Secretary

DOCKET NO. SE87070552

FILED
JAN 26 1998
CLERK

No. 97-962

IN THE

Supreme Court of the United States

OCTOBER TERM 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,

Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,

Respondents..

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

BRIEF ON BEHALF OF RESPONDENT CITY OF NEWARK IN OPPOSITION

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17 pp

QUESTION PRESENTED

Does the Fifth Amendment and Section 1 of the Fourteenth Amendment require that a State Utility Regulatory Agency, accept an automatic rate escalator clause based solely on the Consumer Price Index (CPI) contained in a contract for solid waste disposal service where the solid waste utility fails to present evidence demonstrating the reasonableness of linking changes in solid waste disposal costs to changes in the CPI and also fails to present adequate cost of service data necessary to establish an alternative rate in violation of well established utility policy and law?

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BRIEF ON BEHALF OF THE CITY OF NEWARK IN OPPOSITION

Respondent, the City of Newark ("Newark") respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by petitioner, Solid Waste Transfer & Recycling, Inc. ("SWTR"), seeking review of a decision by the Superior Court of New Jersey, Appellate Division reported at 299 *N.J. Super. 577, 691 A.2d 846 (App. Div. 1997).*

COUNTERSTATEMENT OF CASE

In December 1986, the County of Essex, State of New Jersey (County) issued a "Solicitation of Interest," seeking proposals for the establishment of one or more solid waste transfer stations in the County (Pa5).[1] The solicitation advised all potentially interested parties that any proposed transfer station would require approval of rates or tariffs by the Board of Public Utilities, (BPU) approval under the Solid Waste Management Act, ***N.J.S.A.*** 13:1E-1, ***et seq***. as well as Department of Environmental Protection (Pa6).

Negotiations ensued, and on July 1, 1987, the County and Petitioner, Solid Waste Transfer & Recycling (SWTR) executed the Transfer Station Contract. SWTR's contract provided that it was to be governed and construed pursuant to the laws of New Jersey. The laws of New Jersey, at the time the Contract was executed, provided BPU with plenary authority to review the reasonableness of solid waste disposal rates. ***See N.J.S.A.*** 48:2-13. ***N.J.S.A.*** 48:13A-4; ***N.J.S.A.*** 48:13A-7.

More specifically, the contract also provided that all of its terms were subject to BPU approval. Article 2.7 of the contract, captioned, "Agreement Conditioned Upon BPU approval," stated:

> The parties hereto agree that the rights, duties and obligations imposed upon them herein are subject to

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[1] "Pa" refers to the Appendix filed by SWTR with its Petition for Writ of Certiorari.

> and conditioned upon acceptance and approval of this Agreement by the BPU. Refusal of the BPU to accept and approve this Agreement shall be deemed to be an Uncontrollable Event . . . for purposes of determining the County's liability . . . (CA5).[2]

On July 16, 1987, Essex County filed a petition with BPU seeking approval of the Transfer Station Contracts and of the rate increases necessitated by the contract terms. The BPU, after holding an expedited hearing, provisionally granted the County's petition by Order dated July 31, 1987. The BPU prefaced its order by noting the "emergency nature" of the petition, and on that basis accepted the County's contracts with Petitioner and approved the "interim, initial, emergent tariff" rates proposed by the County. (Pa6 to Pa7)

In February 1988, the County filed a supplemental petition seeking BPU's approval of the County's "interim disposal tariff rates." Several municipalities, including the City of Newark, opposed this petition, which was thereafter transferred to the Office of Administrative Law ("OAL") as a contested case. SWTR was listed as a "co-applicant" with the County in the caption of the referred case.

The matter proceeded to hearing before the Administrative Law Judge in November 1989. SWTR principally relied upon proofs designed to show that its contract was a competitively negotiated, arm's length agreement (Aa881).

SWTR chose to argue that its rates were reasonable because they were part and parcel of a competitively negotiated arms length agreement.

The ALJ issued her Initial Decision on December 26, 1990. The ALJ, in her recommended disposition, found that the Transfer Station Contracts, although arising out of a solid waste emergency in Essex County, were "the result of

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[2] "Ca" refers to the Appendix filed by the Couty of Essex in its Opposition tothe Petition for Writ of Certiorari.

arms-length negotiations in a competitive market.". With respect to the standard of proof, the ALJ opined that a traditional "rate base/rate of return approach" to assessing the reasonableness of SWTR's rates was neither required, nor appropriate, and expressly declined to engage in any such evaluation. The ALJ therefore engaged in no analysis of the reasonableness, from a traditional ratemaking standpoint, of the rate increases generated by the CPI escalator clause. (Pa146 to Pa168)

On review of the full administrative record, BPU, in a final decision dated August 8, 1991, reached a substantially different conclusion from the ALJ. The BPU found that the Contracts were essentially a product of emergent circumstances, and concluded that the reasonableness of SWTR's rates needed to be assessed on the basis of a "traditional ratemaking analysis". The BPU stated:

> [W]e reject the ALJ's finding to the effect that such analysis need not be conducted because the contracts in question were negotiated on a competitive basis. We find that the contracts and the resulting rates were not competitively negotiated. (Pa47)

With respect to the CPI escalator clause, BPU found that SWTR had failed to carry its burden of proving the reasonableness of the rate increases that the clause would generate. In this regard, BPU noted that the components of the CPI did not have a close correlation to the major components of transfer station costs, and that SWTR had failed to present any evidence to demonstrate a nexus between anticipated changes in transfer station operating costs and the CPI. Although ruling that SWTR was therefore not entitled to recover the CPI-based rate increases it was seeking, in all other respects BPU upheld the previously approved "interim rates." (Pa49 to Pa52)

SWTR thereafter sought reconsideration of BPU's decision. During the pendency of that motion, BPU's regulatory functions were merged into the Department of Environmental Protection, to form a new department, the Department of

Environmental Protection and Energy ("DEPE"). (Pa3) DEPE granted SWTR's motion for reconsideration.

After further briefing and argument, DEPE, on August 19, 1994, issued its decision on the merits of SWTR's motion for reconsideration. In the decision, DEPE Commissioner Shinn again denied the CPI-based increases sought by SWTR, and stated:

> I am in complete agreement with the Board's rejection of the CPI-based automatic increases sought by WMNJ and SWTR.
>
> * * *
>
> Only when an automatic adjustment clause has been specially selected to reflect the type of costs under review, has its use been permitted . . . [T]he CPI clauses here (1) were not tailored in any way to reflect transfer station costs and (2) were not subject to any further ratemaking review or analysis.
>
> . . . [T]he burden of proving every aspect of a rate's reasonableness is upon the utility . . . [R]equiring a solid waste utility to demonstrate a "nexus" between transfer station costs and the CPI . . . does no more than to hold WMNJ and SWTR to their burden of proving the reasonableness of their proposed rate . . . WMNJ and SWTR have failed to create a record supporting the reasonableness of automatic CPI-based increases (Pa33 to Pa35)

On April 10, 1997, the Superior Court, Appellate Division issued its ruling affirming the Department's rate determination in its entirety. (Pa2)

On the issue of the rejection of SWTR's automatic CPI-based escalator clause, the Court, stated:

> SWTR knew or should have known from the outset in 1987 that [it was a public entity] and would function and be treated as such.

* * *

> It is patently clear that the Board, and also the [Department] when it succeeded to the regulatory powers of the Board, had the authority to eliminate the applicability of the CPI-based automatic escalator clause of each contract. Each contract was subject to modification in the exercise of the overriding authority of the Board to act in the public interest. (Pa19 to Pa20)

Quoting from *In re Application of Saddle River, 71 N.J. 14, 362 A.2d 552 (1976),* the Court further emphasized that even municipal solid waste contracts arrived at by means of competitive public bidding are nevertheless subject to modification in the public interest. Finally, the Court noted that both transfer station operating contracts:

> contained language which required them to be construed in accordance with and be governed by the laws of this State and we are satisfied that both contracts were entered into subject to the acceptance and approval of the Board. A specific clause to that latter effect is contained in the SWTR contract. (Pa19)

Rejecting SWTR's objections to the Department's requirement that a "nexus" be shown between CPI cost components and those commonly associated with transfer station operations, the Court remarked:

> A meaningful 'nexus' or connection must exist between the underlying cost factors (food, household good, and electronic equipment) built into the CPI and the underlying cost factors (labor, transportation, depreciation, landfill and disposal costs) built into transfer station operation . . . so that the resultant rate after applying the CPI factor can be deemed just and reasonable. (Pa21)

Following issuance of the Court's opinion, a Notice of Petition for Certification was filed by SWTR with the New

Jersey State Supreme Court of New Jersey on April 29, 1997. That petition was denied on September 8, 1997. (Pa1)

ARGUMENT

PETITIONER'S CLAIM OF AN UNCONSTITUTIONAL TAKING OF PROPERTY IS WITHOUT MERIT, AS THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY PROPERLY APPLIED LONGSTANDING PRINCIPLES OF UTILITY RATE MAKING IN REJECTION OF PETITIONER'S PROPOSED SOLID WASTE UTILITY RATES.

I. SUMMARY OF ARGUMENT

Petitioner would urge this Court to believe that the State Board of Public Utilities and the Department of Environmental Protection rejected the CPI provision contained in its Transfer Station Contract due to "arbitrary political influence of Newark, not valid policy". (Pb16)[3] This "arbitrary political influence" was nothing more than a political subdivision of the State of New Jersey exercising its legal rights to participate in a matter which had a direct bearing on the taxpayers of the City of Newark.

Petitioner's attempt to lay their problems in the "political" domain should not be entertained by the court. It was Petitioners failure to support the reasonableness of the proposed CPI-based rate adjustment that lead to the proper rejection of those adjustments. There were no constitutional violations in the decisions of the rate making Agencies or the Appellate review court.

Since the Appellate Division decision is based on well settled law, the Petition for Certiorari should be denied. This is especially true since none of the issues addressed by the reviewing court rise to the level of public importance which warrants this Court's review.

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[3] "Pb" refers to the brief filed by SWTR to support its Petition for Writ of Certiorari.

A. THE AGENCY DECISION DENYING APPROVAL OF THE CPI INCREASES SOUGHT BY SWTR WERE WELL SUPPORTED BY THE RECORD AND ADMINISTRATIVE PRECEDENTS AND AS SUCH DID NOT DEPRIVE PETITIONERS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The burden lies with the utility seeking approval of its rates to demonstrate by competent evidence the reasonableness of its rates.

It is the general rule that an increase in the rates charged by the public utility must be supported by specific evidence of the known and measurable costs incurred in order for the public utility to show the reasonableness of the new rates. In ***Re Commonwealth Water Co.***, 45 PUR 3rd 374 (N.J.B.P.U. 1962) (inflation and its effect on the return allowance require precise findings by the Board in a rate proceeding). Proof of actual expenses is necessary to insure that rates are cost-based. ***N.J.A.C.*** 14:1-6.16A. However, throughout the presentation of its cases, SWTR has failed to produce evidence which would prove that their costs and expenses have increased in an amount equal to the CPI, let alone to the 106% of the CPI allowed in the contract. The CPI is just a general index of many products, including products such as produce and clothing which are of little relevance to any cost increase incurred in operating a transfer station. SWTR has failed to meet its statutory burden of proof and thus was not entitled to any increase based upon the CPI.

B. AS A MATTER OF REGULATORY AUTHORITY AND THE EXPRESS TERMS OF THE CONTRACT, SWTR WAS NOT ENTITLED TO AUTOMATIC INCREASE BASED UPON THE CPI.

The BPU has been vehement in its rejection of the CPI as a viable factor in determining just and reasonable rates. The Board has "consistently refused to recognize increases associated with general inflationary factors." ***Petition of***

Elizabethtown Water Co., 11 ***N.J.A.R.*** 303, 337 (O.A.L. 1984), ***aff'd BPU Decision and Order***, No. 8312-1072 (1984), ***rev'd on other grounds***, 205 ***N.J. Super.*** 528 (App. Div. 1985), ***aff'd as modified***, 107 ***N.J.*** 440 (1987). ***Re Jersey Central Power and Light Co.***, 85 *N.J.* 520, (1981); ***Re Commonwealth Water Co.***, 7 PUR 4th 456 (N.J.B.P.U. 1974). The automatic increases sought by the Petitioner were based upon the Consumer Price Index, a general inflationary factor which the BPU has consistently refused to recognize as a valid basis for an increase in a public utility's rate.

For example, in ***Elizabethtown Water***, above, the BPU affirmed an OAL decision disallowing a general four percent inflationary increase in the calculation of expenses, endorsing the ALJ's conclusion that such a disallowance was "consistent with prior Board policy which does not recognize recovery of inflation related adjustments.": 11 ***N.J.A.R.*** at 338. Likewise, in ***Re Jersey Central Power and Light Co.***, above, the Board rejected the petitioner's use of the CPI in its update of the future costs of nuclear plant decommissioning for the Oyster Creek nuclear generation facility and the Saxton experimental station. The BPU agreed with the recommendation of staff and rate counsel that "the CPI did not accurately reflect the true cost of decommissioning because it does not truly quantify petitioner's projected labor costs." 65 PUR 4th at 178. The BPU believed that while more specific indices are helpful in determining costs, the CPI is too general and thus fails to give an accurate reflection of increases in costs. ***See Re Commonwealth Water Co.***, 7 PUR 4th at 467. ***See also Re Adjustment Clause in Telephone Rate Schedules***, 3 PUR 4th 298, 306 (N.J.B.P.U. 1973) ***aff'd as modified*** 66 ***N.J.*** 476 (1975) (the BPU considered an adjustment clause for "other expenses" pegged to fifty percent of the increase in the CPI and held that the CPI was ***not*** a proper index upon which to base such an increase).

The BPU's interim decision and order ***In The Matter of The Application of SES Gloucester Company*** (BPU Docket No. SE-85100984, October 21, 1987) should not be relied upon because it is clearly distinguishable. There, the Board

approved a twenty-year utility rate formula for a resource recovery facility that included a formula providing for annual adjustments based upon changes to the Producer Price Index ("PPI"). However, the decision (at p. 12) states that increases are subject to further order of the Board, and thus the Board had retained its discretion to disallow any adjustment which were not just and reasonable.

In contrast, SWTR's contracts with Essex County called for CPI, not PPI, adjustments, for short-term, not long-term rates. Both contracts also provide that the CPI increase apply ***automatically***. Resource recovery rates are distinguishable from the rates of other types of utilities. Thus, ***SES Gloucester*** is limited to its facts and cannot apply in this situation.

Other jurisdictions likewise have rejected increases in rates tied to the CPI. In ***Re Otter Tail Power Co.***, 21 PUR 4th 254 (S.D.P.U.C. 1977), the South Dakota Public Utility Commission rejected an adjustment to increase operating costs for rate-making purposes linked to the CPI. The Commission found that the CPI "utilized by company in determining its inflation adjustment is irrelevant and inapplicable to the inflation company may incur in the future." ***Re Otter Tail Power Co.*** at 273. In declining to allow this increase based on the CPI, the Commission held:

> the effects of inflation on a company do not in any reasonably accurate manner parallel those contained in [the CPI]. The Commission finds that it is improper to allow for any expenses which are merely designed to raise the revenue requirement of company without adequate justification and support in the record. The Commission finds that company's proposed inflation adjustment constitute exactly such an unjustified item. Otter Tail Power Co. at 274.

Finally, SWTR's contention that it is entitled to this CPI increase based upon their contract entered into with Essex County to operate the transfer station is without merit. As noted, it is long-standing New Jersey law that a contract

between a subdivision of the State and a public utility "is a contract subject to the State's sovereign power over rates, and when, as in this case, the state through its Board of Public Utility Commissioners exercises it sovereignty over rates, the contract rights of the parties must yield." ***N.J. Bell Telephone Company v. West Orange***, 188 ***N.J. Super***. 455, 460 (App. Div. 1982), quoting ***Atlantic Coast Electric Rail Co. v. Public Utility Comm'rs. Bd.***, 92 N.J.L. 168, 173 (E. & A. 1918), ***app.dism.*** 254 U.S. 660 (1920). ***See In re Application of Saddle River, supra*** 71 N.J. at 23.

Additionally, Petitioner was fully aware, when it executed the Transfer Station Contract, of the existence of the State's jurisdiction and authority to amend the contract in question. ***In re Application of Saddle River, 71 N.J. 14, 23, 362 A.2d 552 (1976); N.J.S.A. 48:13A-7*** (where BPU determines that rates or charges received for solid waste disposal services are excessive, "it may order the person charging such excessive rates or charges to make an adjustment in the tariff or contract to a sum which shall result in just and reasonable rates or charges.") Hence, petitioner's assertion that is was denied the benefit of its contract because BPU rejected the CPI provision after petitioner performed under the contract utterly ignores the obvious and compelling fact that the Transfer Station Contract was entered into on an interim, emergent basis subject to BPU approval.

C. THE DECISIONS OF THE AGENCIES DO NOT CONSTITUTE OR EFFECTUATE A "TAKING" OF SWTR'S PROPERTY.

Although unable to show, or even credibly assert, that it suffered financially under the agency decisions below, SWTR nonetheless characterizes the denial of its CPI increases as "confiscatory".

While a governmentally fixed rate confining a public utility's return from operations to an amount below the point of confiscations violates due process, ***Denver Union Stock Yard Co. v. United States, 304 U.S. 470, 475*** (1938), it is also well settled that a company operating in a heavily regulated field

such as the solid waste indutry need only "be permitted a return sufficient to assure its financial health." ***State Farm Mutual Automobile Ins. Co. v. State***, *124 N.J. 32, 48, 50, 590, A.2d 191 (1991).* Similarly, it is an established principle of public utility law that "[r]egulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investor's interests provide only one of the variable in the constitutional calculation of reasonableness." ***Permian Basin Area Rate Cases***, *390 U.S. 747, 769 (1968), (citing Convington & Lexington Turnpike Co. v. Sandford, 164 U.S. 578, 17 S. Ct. 198 (19).*

In this case, the record well supports BPU's, DEPE's, and the Appellate Division's findings that the CPI increases sought by the Petitioner were unreasonable and excessive.

The truth is the Petitioner took a calculated business risk and could not, in the final analysis, support by any credible evidence the exorbitant rate increases it was seeking.

CONCLUSION

Petitioner knows full well when it entered into the Transfer Station Contract that it was not final. Petitioner knew that there were to be reviews by the BPU & DEPE. Petitioner knew that they would have to present credible evidence to support the CPI clause in the contract. Yet having known this, the Petitioner now complains that its Constitutional rights have been violated. The fact of the matter is that the Petitioner could not and did not show the reasonableness of the CPI increase. The Petitioner utterly failed to demonstrate any nexus or relationship between the operating costs of the Transfer Station and the CPI based escalator clause in the Contract. Accordingly, Respondent City of Newark respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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97-962

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SOLID WASTE TRANSFER & RECYCLING, INC.,
Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION; THE COUNTY OF ESSEX, NEW JERSEY; THE CITY OF NEWARK, NEW JERSEY; THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE, DIVISION OF RATEPAYER ADVOCATE and WASTE MANAGEMENT OF NEW JERSEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITIONER'S REPLY BRIEF

Petitioner Solid Waste Transfer & Recycling, Inc. ("Petitioner" or "SWTR") submits this brief in reply to the briefs filed by respondents New Jersey Department of Environmental Protection ("DEP"), the County of Essex ("Essex" or the "County"), and the City of Newark ("Newark") (collectively "Respondents") in opposition to SWTR's Petition for Certiorari. In their briefs, the Respondents stray time and again from facts in a futile effort to conceal the constitutional violations of SWTR's rights.

In its petition, SWTR warned that "[w]hen push comes to shove, the respondents will be unable to cite to this Court even one other case where the state excised an inflation-linked adjuster from a utility contract under its jurisdiction." (Petition, p. 16). As promised, the Respondents arrive at this Court empty handed. Despite their protestations that forfeiture of SWTR's inflation-linked adjuster represents nothing more than enforcement of well-established policy, the Respondents cite no other case where this asserted "well-established" policy was enforced against a contract utility.[1] This omission results not from their neglect: there simply are no such cases, and there simply is no such policy. (*See* 163a; 188a-189a).

Having no real policy upon which to rely, the Respondents resort to confusion. They accuse SWTR of not carrying its burden of proof, even though the Administrative Law Judge (the "ALJ") concluded that SWTR proved its case by the "overwhelming weight" of the evidence. (147a). Despite Essex's efforts to argue that SWTR's operating deficit resulted from its excessive debt-to-equity ratio rather than from legitimate operations -- a position that no accountant would even sanction under oath at the hearings -- the following facts are unassailable: (1) SWTR experienced a legitimate operating deficit caused by its payment of approved operating expenses; (2) SWTR's deficit was caused by its payment of approved expenses; and (3) the contract rates, if enforced, would have resulted in a seven percent annual return on SWTR's total investment in the project. Respondents cannot be permitted to create factual "issues," without citation to any support in the record, so as to frustrate review in this Court.

Second, the Respondents repeatedly assert that SWTR did not produce a regulatory cost-of-service case. SWTR's costs proofs were comprehensive. Based on her exhaustive review of facts, the ALJ concluded that SWTR proved its entitlement to enforce its contract rates not just through its competitive

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[1] The Respondents can only resort to citing cases involving inapposite tariff utilities that perform services without a contract. (*See* Point III).

market proofs, but through its operating ratio cost-of-service case and its comparative rates analysis. (192a; *see* 181a). SWTR's operating ratio case was supported by the expert testimonies of Dr. Joseph Mauriello, who testified in detail as to SWTR's expenses[2], and of the preeminent economist Dr. James L. Bicksler, full professor at the Rutgers University Graduate School of Management. Dr. Bicksler "testified regarding his analysis of an appropriate rate of return under varying regulatory methodologies" (191a). The ALJ concluded that Dr. Bicksler's operating ratio analysis was persuasive and corroborative, from a cost-of-service perspective, of the reasonableness of SWTR's rates. (181a).

I

THE REGULATION OF SWTR IS UNCONSTITUTIONAL

Respondents acknowledge that SWTR was constitutionally entitled to a "rate sufficient to assure its financial health." *State Farm Mutual Automobile Ins. Co. v. State of New Jersey*, 124 N.J. 32, 48, 590 A.2d 191 (1991) (*See* Eb11), but they skirt the significance of this precept in their discussions. The issue before this Court is whether the state, consistent with the Fifth and Fourteenth Amendment of the United States Constitution, may fix a rate for utility services that is insufficient for the utility to pay even its necessary and approved operating expenses.

The Respondents avoid this issue altogether by arguing that the regulators concluded that SWTR's rates, as adjusted in accordance with Consumer Price Index ("CPI") clause of the contract, were excessive. No such finding was ever reached at any level of review in this matter.

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[2] The DEP counsel's complaint that, with respect to SWTR's expenses, its staff was forced to rely on unaudited financial statements that "comingled" transportation and disposal costs is remarkable. Dr. Mauriello presented live, sworn testimony in which he detailed each and every of SWTR's expenses.

The DEP and the Board of Public Utilities ("BPU") (collectively the "regulators") declined to enforce SWTR's CPI-adjusted rates not because they were excessive -- in fact they still would have been the lowest in the state for comprehensive transfer services -- but because SWTR allegedly did not show a "nexus" between the cost components affecting the CPI and the cost components of SWTR's operations. (35a). The regulators, asserting that their "policy" required such a showing before a utility could enforce an inflation-linked adjuster, struck the CPI clauses and created a deficit situation. SWTR contends that since the constitution prohibits the state from fixing a confiscatory rate, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989), and a rate insufficient to pay even approved expenses is demonstrably confiscatory, that the regulators' decision cannot survive constitutional scrutiny.

A. *SWTR's Deficit Is Legitimate*

It was, is, and will always be undisputed that SWTR experienced a legitimate operating deficit. SWTR's witness, Dr. Joseph Mauriello, testified to this fact at the hearings, and his testimony was undisputed. While neither the DEP nor Newark challenge SWTR's operating deficit, Essex now argues in its brief that SWTR's deficit was illusory.

No accountant would offer as expert sworn testimony the amateur accounting that Essex urges to this Court. Because Dr. Mauriello's testimony that SWTR faced a legitimate operating deficit of $2,722,569 opinion was unassailable, the parties could not dispute his opinion with contrary opinion. The ALJ wrote that Dr. Mauriello's "background in finance and economics is extensive, and he was an extremely credible and persuasive witness." (191a).

The county's counsel now tries to wear the hat of its absent expert accountant in arguing that SWTR, through creative accounting, was able to "show" a deficit through an excessive debt-to-equity ratio. (Eb11). Essex argues that since "shareholder 'notes' were payable at rates of up to 16%," (Eb11) SWTR's deficit was no surprise -- an insupportable

premise that Essex could not even dignify with a single citation to the record. The first flaw in the County's accounting analysis is that it was undisputed that SWTR did and could not repay debt owed to its shareholders in accordance with note terms. (208a). SWTR's deficit thus was not caused paid by interest payments on principal.

Second, even if SWTR had been repaying consistent with note terms, Essex misleads when it writes that the notes were to be "payable at rates of up to 16%." Two notes, for a short duration prior to April 1, 1988, were intended to be paid at 16 percent interest. (114a). This Court cannot permit Essex to get way with advocating that repayment of notes "payable at rates of up to 16%" caused SWTR to "show" a deficit. Essex must point to some evidence supporting its argument. Vague and misleading accusations do not do duty for facts of record; they certainly cannot undermine undisputed expert opinion offered by a persuasive and credible witness.

When SWTR writes that, if the CPI clauses were enforced, it would have shown a profit of $704,924[3] during the relevant period, that profit is calculated on SWTR's total investment of $3.5 million, regardless of whether the money was initially invested as equity or debt.

B. *SWTR'S Rent Was Competitive*

Nor is the County's effort to pin the blame for SWTR's deficit on its rental expense legitimate. (Eb11-12). The ALJ and the regulators accepted SWTR's rental expense of $900,000 per year as reasonable. (55a). This Court should decline Essex's invitation to revisit these factual findings of the regulators.

The regulators concluded SWTR's negotiations with its landlord were at arm's length and competitive, resulting in a reasonable rent obligation. At the hearings, Newark produced

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[3] Respondents mislead with the suggestion that SWTR sought adjustments in excess of the CPI. (*See* Petition, p.14, n.5).

a real estate appraiser who estimated that the rental value of the property was $129,000 per year. The ALJ was quick to dismiss this testimony as uninformed. (187a).

SWTR produced its own expert real estate appraiser, Richard Marashlian, whom the ALJ concluded was far better informed as to the facts concerning the transaction. (187a-188a). Mr. Marashlian determined, *before* consideration of the enhanced business value that the site's ideal location created for a transfer station operation, that SWTR's fair market rental would be $657,000. He testified that because the transfer station site met stringent environmental siting requirements, it possessed an enhanced business value for a transfer station operation. Citing a lack of market data, Mr. Marashlian refused to speculate to what extent the site's ideal location enhanced the fair market rental for SWTR. Only one other transfer station in New Jersey, the Morris County transfer station, rented its facility. It paid $955,000 per year. (Hearing Exhibit WMNJ-10A). While the data regarding enhanced business value may have been inconclusive, the regulators must have been impressed that SWTR paid considerably less than its Morris County counterpart. (55a). When Essex writes that SWTR entered into a "lease with a company owned by one of its principals" (Eb11), it neglects that Harold Martin, a principal of the landlord, purchased an equity stake in SWTR *after* SWTR had executed its lease. (182a). Essex's insinuation of some cozy relationship between SWTR and its landlord, Glopak Corporation, is belied by the record. Throughout the proceedings below, Glopak and SWTR, and their principals, were engaged in extensive litigation against one another. (182a).

C. *SWTR's Expenses Are Reasonable*

SWTR established in its Petition that its deficit resulted from the payment of operating expenses approved by the regulators. DEP's counsel now argues that the regulators' acceptance of SWTR's expenses was "generous." (DEPb14). The DEP's response is more telling than it might care to admit.

This Court should expect that DEP's counsel would argue, with august conviction, that factual findings of its clients are unassailable. Yet the DEP now soft pedals its own factual determinations. This can only be perceived as the DEP's implicit recent recognition of the constitutional infirmity of its decision. The DEP has no valid response as to how SWTR could legally be driven into deficit for paying expenses it approved. So it asserts that it was "generous" with SWTR, "in view of the limited nature of the data available from SWTR." (DEPb14). In truth, SWTR's proofs as to its expenses were comprehensive. (*See* 118a-131a.)

As DEP's counsel should argue to this Court, the findings of its clients upholding SWTR's expenses are completely supported in the record. SWTR was driven into deficit simply from paying these approved expenses, and respectfully requests that this Court review the constitutional implications of these undisputed circumstances.

II

THE STATE'S SEVERANCE OF THE CPI CLAUSE IS UNCONSTITUTIONAL

The Respondents argue that the state enjoys the sovereignty to modify any contract under its jurisdiction. They therefore contend that any exercise of the state's right to modify a contract is constitutionally permissible. Unfortunately for the Respondents, the second premise does not follow from the first.

SWTR does not dispute the state's right to modify utility contracts. It contends, however, that the state's sovereignty to modify the SWTR contract is subject to the constitutional requirement of due process and its prohibition against takings. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989). The DEP's order in this matter expressly states that it can modify a utility contract without regard to constitutional principles:

> "Every contract with respect to utility rates in conclusively deemed to be made with the knowledge and in contemplation of the sovereign power of the

> state to alter it, and hence no objection can be raised that state regulation impairs the obligation of contract or deprives the contracting parties of property without due process of law ..."

(35a, *quoting*, 73B *C.J.S.* "Public Utilities" at 164). SWTR disagrees with this assessment. Where the state alters a utility contract in a manner that deprives the utility of a rate sufficient to protect its financial health, *see Bluefield Water Works & Improvement Co. v. Public Service Commissioner of West Virginia*, 262 U.S. 679, 693 (1923), then the state action is unconstitutional regardless of what policy the state asserts as its justification. *Duquesne Light,* 488 U.S. at 310 ("it is not theory but the impact of the rate order which counts").

III

THE STATE'S SELECTIVE REGULATION OF SWTR IS UNCONSTITUTIONAL

With no way to refute SWTR, the DEP remains honorably silent in response to SWTR's challenge to identify even one other case where its asserted anti-CPI policy was applied to a *contract* under the state's rate-making jurisdiction. Essex and Newark stoop to confusion tactics, citing cases where the regulators denied inflation-linked relief to more traditional *tariff* utilities. (Eb9 and Nb7). The distinction between a tariff utility and a contract utility is well founded: although a contract utility enjoys no right to relief from disadvantageous pricing terms of its contract, *In re Application of Saddle River*, 71 N.J. 14, 25 n. 12 (1976), *citing Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348, 354-55 (1956), a tariff utility may petition the state for rate relief at any time its existing rate structure proves insufficient.

SWTR is cloaked with a right to due process and equal protection of New Jersey's laws and, in the absence of some rational state basis, the state must treat SWTR as it treats other contract utilities under its jurisdiction. *See Lindsey v. Normet*, 405 U.S. 56, 77 (1972). The issue before this Court is

not how the state treats tariff utilities, but how it treats similarly-situated contract utilities.

SWTR cited prior and subsequent examples where contract utilities enforced inflation-linked adjusters without being required to show any nexus between costs components of the index and cost components of their operations. *In the Matter of the Application of SES Gloucester*, BPU Docket No. SE85100984 (BPU, October 21, 1987) ("SES Gloucester") (216a); *In the Matter of the Petition of the Union County Utilities Authority*, DEP Docket No. CT05593003 (DEP, January 14, 1994) ("Petition of UCUA") (214a). SWTR also cited to another case where a solid waste transfer station was entitled to enforce its contract rates, including annual escalators, simply because the contract was negotiated under competitive conditions. *In the Matter of the Application of the Passaic County Utilities Authority*, BPU Docket No. S08704360 (October 26, 1987) (216a) (the "PCUA Order"). But different rules apply to SWTR.

The state seeks to distinguish the PCUA Order and the Petition of UCUA by arguing that, because the contracts in question also involved out-of-state parties, it lacked jurisdiction in those matters. (DEPb10-11). But the state approved the contract in the PCUA Order, and significantly modified the contract in the Petition of UCUA, while leaving that contract's CPI-linked adjuster in place. (214a; 216a).

The Respondents are therefore left to argue that, in the cases cited by SWTR, the inflation-linked escalators were approved because they were tailored to reflect the utility's operating costs, or because in each case, the increases were subject to on-going regulatory review. As for the Respondents' first point, it just is not true. No language in the cited orders provides that the increases were acceptable because they were tailored to reflect the utility's operating costs. As for their second point, no clause in any of the approved contracts in the matters cited by SWTR provided that the contractual increases were subject to the regulators' on-going review after

approval. The regulators imposed their on-going review as a condition of their acceptance. Why not here?

Finally, Essex seeks to distinguish the PCUA Order by comparing the tipping fees in that case "in the $65.00 range" and the "$100+" tipping fees paid to SWTR. (Eb15). The Passaic County tipping fees did not include any disposal costs, taxes, or host community benefits, all of which were included in SWTR's tipping fee. (131a-133a). Mercer County's tipping fee of $92.26 did not include disposal costs (132a). SWTR provided the lowest rates in the state, even when the CPI increases were applied. (131a).

CONCLUSION

Respondents argue that this case is a local matter unworthy of this Court's attention. To the contrary, this matter presents a clear constitutional violation for which this Court should provide a remedy. SWTR believes that its rights are protected, not just in theory, but by a vibrant document. In other lands people may be governed by a constitution grand in theory but not in practice. In this land, constitutional protections are not paper promises. SWTR respectfully requests that its Petition for Certiorari be granted.

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